IN THE

Supreme Court of the United States

October Term, 1978.

No. 78-1069

BALTIMORE AND OHIO CHICAGO TERMINAL RAILROAD COMPANY, et al.,

Petitioners,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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January 3, 1979

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UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Petitioners, common carriers by railroad listed in Appendix A, pray that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Third Circuit.

THE OPINIONS BELOW.

The opinion of the Court of Appeals is reported at 583 F.2d 678 and appears in Appendix B, A3. The order of the Court denying rehearing also appears in Appendix B, A34. The interim report of the Interstate Commerce

Commission appears at 349 I.C.C. 411 (1975) and is printed in Appendix B, A35. The final report and subsequent order of the Commission appear at 353 I.C.C. 567 (1977) and are printed in Appendix B, A86.

JURISDICTION.

The judgment of the Court of Appeals was entered on September 6, 1978. A timely petition for rehearing was denied on October 5, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 2350(a).

QUESTIONS PRESENTED.[1]

1. Whether the Commission has authority to divide revenues—in this instance, demurrage revenues—between railroads under former Section 1(6) (now revised 49 U.S.C. 10750) and without observing the requirements of former section 15(6)(a) of the Interstate Commerce Act (now revised 49 U.S.C. 10705(b) and (e))?

2. Whether the Commission's order is invalid under the provisions of former Section 17(14)(b) of the Interstate Commerce Act?

3. Whether the Commission's order permits unlawful rebates contrary to the provisions of former Sections 6(7) and 15(15)(a) of the Interstate Commerce Act (now 49 U.S.C. 10761 and 10747) and former Section 41(1) of the Elkins Act (now 49 U.S.C. 11903)?

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1. In the event certiorari issues, petitioners will also raise the question of whether the Interstate Commerce Commission's order is supported by "adequate rationale".

STATUTES INVOLVED.

The principal statutes involved are: [2]

Interstate Commerce Act

49 U.S.C. 10750, former 49 U.S.C. 1(6)
49 U.S.C. 10761, former 49 U.S.C. 6(7)
49 U.S.C. 10705(b) and (e), former 49 U.S.C. 15(6)(a)
49 U.S.C. 10747, former 49 U.S.C. 15(15)
49 U.S.C. 17(14)(b), eliminated in recodification
49 U.S.C. 11903, former 49 U.S.C. 41(1)

Administrative Procedure Act

Section 10, 5 U.S.C. 706

These statutes appear in Appendix C, A142.

STATEMENT.

This is a case of first impression.

Prior to and since the 1887 enactment of the Interstate Commerce Act (Act) demurrage (car detention) charges against shippers have been assessed and retained as revenues by the originating or terminating railroad and without regard to the ownership of the car. In this instance, the Commission has undertaken to *divide* these revenues, not on the basis of Section 15(6)(a) [3] considerations governing divisions between railroads, but on the basis of Section 1(6),[4] as amended by the Railroad Revitalization and Regulatory Reform Act of 1976 (4R Act).

2. On October 17, 1978, the Interstate Commerce Act, formerly 49 U.S.C., prec. Section 1, *et seq.*, was recodified without substantive change as Title 49—Transportation, Subtitle IV— Interstate Commerce, 49 U.S.C. 10101, *et seq.*, Public Law 95-473, 95th Cong., 92 Stat. 1337. Petitioners will use the former description, e.g., "Section 1(6) of the Act" in order to provide continuity with the opinions of the lower court and the I.C.C.

3. Now revised 49 U.S.C. 10705(b) and (e).

4. Now revised 49 U.S.C. 10750.

In 1970, the railroads sought and eventually were granted an increase in their published demurrage charges. *Demurrage Rules And Charges, Nationwide,* 340 I.C.C. 83 (1971). The previous charges of $5, $10 and $15 per car, which had existed since 1964, were increased to $10 per car for each of the first four days (after elapse of the normal 48-hour free time), $20 for each of the next two days and $30 for each day thereafter.

On October 19, 1972, the Commission issued its notice proposing to require the collecting railroad to remit to the car owner all demurrage charges accrued in excess of $10 per car per day. The stated purpose of the proposal was to:

> "create an added incentive for the railroad car owner to acquire additional cars . . . [and to] remove any inducement on the part of the non-owner railroad to encourage detention of foreign cars in order to benefit from collection of demurrage charges."

After the receipt of comments and an interim report, 349 I.C.C. 411, the Commission (Commissioners Christian, MacFarland and Murphy dissenting) issued its regulation requiring the collecting railroad to remit to the car owner, whether railroad or private, all demurrage collected in excess of $10 per day. *Remittance Of Demurrage Charges By Common Carriers Of Property By Rail,* 353 I.C.C. 567 (1977) (A86).

This totally irrational result was reached with no evidence either that car owners would spend this "new money" for additional cars or that any "non-owner" had actually "encouraged" detention. In fact, the few railroads supporting the proposition strenuously objected to any "earmarking" of the funds for car acquisition purposes, and there was never an explanation of how any railroad, car

owner or not, could possibly "encourage" detention, the latter being wholly within the control of the shipper.

Recognizing the gravity of the situation, the Commission, by subsequent order, concluded to stay the remittance order pending judicial review because of the "serious legal question involved" and the "irreparable injury" to petitioners (A140-1).

The Court of Appeals for the Third Circuit sustained the Commission's order, but on different grounds than those stated by the agency.

REASONS FOR GRANTING THE WRIT.

I. Section 1(6) Does Not Authorize the Commission to "Divide" Demurrage Revenues. Authority to Divide Railroad Revenues Lies Only Under Section 15(6)(a), Which the Commission Did Not Here Pursue.

When the Commission initially embarked on this precedent-shattering program in 1972, it cited no less than 13 different sections or subsections of the Interstate Commerce Act (Act) as providing it with the authority to divide demurrage revenues. In its final report, however, it rested jurisdiction on Section 1(6), as amended under the 4R Act.[5] The amendment in question added the following language (49 U.S.C. 10750):

> "A rail carrier . . . shall compute demurrage charges, and establish rules related to those charges, in a way that fulfills the national needs related to—
>
> (1) freight car use and distribution; and (2) maintenance of an adequate supply of freight cars to be available for transportation of property . . ."

There is not the slightest suggestion by the Commission at any point here that the then existing demurrage charges were not so designed. In fact, precisely the contrary finding was made when the carriers last increased the prior changes in *Demurrage Rules, supra,* 340 I.C.C., p. 90:

> "It is important to bear in mind that, except in extraordinary circumstances, car detention is solely within the control of the shipper. Those who release cars promptly will not be adversely affected by any of the increased charges. On the other hand, to the extent that such increases influence the more prompt re-

5. Railroad Revitalization and Regulatory Reform Act of 1976.

> lease of equipment . . . the entire shipping public and the carriers will benefit. We believe that the charges hereinafter approved . . . will go a long way in achieving the desired result."

Contrary to the express direction of Section 1(6), however, the Commission did not here "compute" anything. The level of demurrage charges to the shipper remains unchanged, and if the shipper is content to hold the car at today's demurrage rate, there is no reason why he would be pressured into an earlier release by what the Commission now proposes. The sole and undeniable result is the shifting of millions of dollars within and out of the railroad industry with no effect whatsoever on car utilization.

The Commission's view is that while amended 1(6) authorizes only the "computation" of demurrage, the legislative history of the amendment supports a "division" of the revenues. In this context, the Commission refers to the following quote from the Report of the Committee on Interstate and Foreign Commerce:

> "The purposes of the proposals [to divide demurrage revenues] are to create an added incentive for the car owner to acquire additional cars and remove any inducement to the nonowner to encourage detention of foreign cars in order to benefit from collection of demurrage charges." (353 I.C.C., p. 573, A95).

There is, of course, no suggestion of record that the collecting railroad would—or possibly could—"encourage" the detention of any car, owned or foreign. If the consignee elects to hold a car and pay the established demurrage rate, he may do so—by tariff—*ad infinitum*. The striking feature here is the "bootstrap" operation of unprecedented extent by an administrative agency, i.e., the

quotation immediately above was in fact lifted bodily from a letter by the Commission itself to the Committee. The Committee was only commenting on the Commission's pending proceeding.

The lower Court was not particularly impressed with this *modus operandi*, but it sustained the Commission on different grounds:

> "While the language of § 1(6) does not specifically authorize remittance to car owners, it is equally clear that the statute does not prohibit such an arrangement."

From this, the Court reasons that any question of interpretation, e.g., whether the term "compute" includes authority to "divide," should be resolved in favor of the agency. That conclusion alone contravenes the many expressions of both the judiciary and the agency itself: the Commission is a creature of statute and has only those powers expressly granted by the Congress. *Seatrain Lines v. United States,* 64 F. Supp. 156, 160 (1946); *United States v. Pennsylvania R.R. Co.,* 242 U.S. 208 (1916); *Wharfage Charges At Atlantic And Gulf Ports,* 157 I.C.C. 663, 689 (1929).

In indulging the Commission's interpretation of amended 1(6), moreover, the lower Court ignored those very provisions of the Act which this Court, time and again, has referred to in reviewing this agency's actions with respect to any division of revenues.[6] And, in so doing, the Third Circuit's opinion contradicts one of most recent vintage by the Fifth Circuit, wherein this Court, except on a limited and non-substantive basis, denied certiorari.

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6. The issue of division of revenues under 49 U.S.C. 15(6)(a) was fully briefed in the Court of Appeals.

Aberdeen & Rockfish R. Co. v. United States, 565 F.2d 327 (C.A. 5, 1977) involved the propriety of a terminal surcharge levied by the Long Island Rail Road Company (LIRR) over and above its joint rates with other railroads, such surcharge to accrue solely to LIRR to cover the additional expenses incurred by reason of increased railroad retirement taxes. This revision of existing revenues—approved by the Commission—was set aside by the Fifth Circuit with the following:

> "The Supreme Court, affirming a three-judge court in the Eastern District of Louisiana has made it clear that a departure from the equal-factor basis of divisions of joint rates can be allowed only on the basis of specific findings. *Aberdeen & Rockfish R. Co. v. United States,* 270 F. Supp. 695 (E.D. La., 1967), affirmed *Baltimore & Ohio R. Co. v. Aberdeen & Rockfish R. Co.,* 393 U.S. 87 . . . In the case at bar, such findings were not made by the ICC because it reasoned that the Long Island's terminal surcharge was an 'add-on' and not a modification of the joint rates. We reject this reasoning as totally unrealistic.
>
> "We regard the present case as involving in economic terms a change in the joint rates and divisions thereof. It could not be doubted that if the Long Island added a terminal surcharge avowedly to increase its profits or to cover wage increases for all its employees, and the ICC ordered the other railroads to collect from shippers such amounts as well as joint rates this would constitute an undermining of both joint rates and equal division of joint rates. We see no difference when the add-on is to recoup tax payments." (565 F.2d, p. 335)

There is no difference between the result sought there by LIRR and that intended here. Whether described as such

or not, the Commission's proposal to divide—as distinguished from "compute"—demurrage revenues runs afoul of Section 15(6)(a), which requires, "after full hearing," a finding that the existing apportionments of joint rates and *charges* are unreasonable or otherwise unlawful and that due consideration be given to:

a) efficiency of carrier operations;

b) revenue required to pay operating expenses;

c) taxes; and,

d) fair return on investment.

New England Divisions Case, 261 U.S. 184, 203 (1923). *All* of these elements *must* be considered by the Commission. *Atchison, T. & S. F. R. v. United States*, 225 F. Supp. 584, 606-7 (1964). *None* of these considerations were adverted to here by the I.C.C. or by the lower court.

Remand is imperative if the Congressional safeguards now afforded the carriers with respect to their proper share of joint revenues are to remain inviolate.

II. The Lower Court Erred in Refusing to Enforce the Statutory Time Limitation.

Section 303(b) of the 4R Act added the following to Section 17 of the Interstate Commerce Act:

> "Within one year after the date of the enactment of this subdivision, the Commission shall conclude or terminate with administrative finality, any formal investigative proceeding with respect to a common carrier by railroad which was instituted by the Commission on its own initiative and which has been pending before the Commission for a period of three or more years following the date of the order which instituted such proceeding." (Former 49 U.S.C. 17(14)(b)).

It is indisputable that the investigation at hand began almost 3½ years prior to the enactment of 4R and was not concluded until 14 months thereafter, and the lower Court expressly rejected the Commission's argument that this proceeding was an "informal" investigation and therefore exempt from the statutory requirement. The Court, however, then declined to enforce the very limitations it had already found applicable, essentially on the grounds that the Congressional directive to "complete" was not "absolute" and equitable considerations, i.e., "the vast resources that have obviously been extended in the course of Ex Parte No. 289" made it inappropriate to enjoin the order for remittitur (A26-30).

Regardless of the expenditure of effort, the intent of the Congress is clear, and it was the absolute duty of the lower Court to enforce the law as written. Instead, that Court, for all practical purposes, simply eliminated 17(14)(b).

That the lower Court in fact thwarted the Congressional purpose to do away with Commission "foot-dragging" is obvious from subsequent developments. In the recodification of the Act, 17(14)(b) was eliminated as:

> "Executed. Provided that within one year after February 5, 1976, formal investigative proceedings with respect to a common carrier by railroad instituted by the Commission which had been pending for 3 or more years *would terminate.*" [7]

Obviously, the Congress terminated 17(14)(b) under the impression that the Commission had complied with the statutory directive. The lower Court finds that the Commission, at least in this instance, had not complied, and it erred in refusing to enforce the limitation.

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7. Report of the Committee on the Judiciary, House of Representatives, on H.R. 10965, Report No. 95-1395, July 26, 1978.

III. The Lower Court's View of Demurrage Charges Permits Rebates to Shippers in Violation of Sections 6(7), 15(15), and 41(1) of Title 49.[8]

While the lower Court expressly recognizes that a payment to a private car-owning shipper without tariff authority and in excess of the costs incurred would result in an unlawful rebate, it declines to interfere with the proposed remittitur on the perfectly astonishing ground that a demurrage charge is neither a "rate" under 41(1) nor a "charge" under 15(15). Rather, says the Court,

> "the essential nature of demurrage is that of a car service regulation,"

and therefore the remittance of demurrage charges does not constitute a departure from the published freight rates (A32-3). This is not only a "first" in transportation history, but a misconception of monstrous potential.

Demurrage, whether of "car service" genre or not, has always been treated as any other published tariff charge. It can be collected *only* if it is published in tariffs on file with the Commission, *Berwind-White Coal Mining v. Chicago & E. R.R.*, 235 U.S. 371, 375 (1914), and both carriers and shippers are subject to sanctions where they fail to collect or pay it per tariff:

> "Demurrage charges are part and parcel of the transportation charges, and are covered by the same rules of law. They are a part of the tariff, and must be collected from the shipper or the consignee of the freight to the same extent as the charge for carriage. A penalty is imposed on the carrier for failure to collect (Union Pacific Ry. v. Goodridge, 149 U. S. 690, 691); the purpose of the law being, of course, to secure absolute equality between shippers. . . .

8. Now 49 U.S.C. 10761, 10747 and 11903.

> Mistake, inadvertence honest agreement, or good faith are alike, under such circumstances, unavailing." *Davis v. Timmonsville Oil Co.*, 285 F. 470, 472 (1922).

The lower Court's construction of the law renders invalid all of the previous decisions by both the Commission and this Court rendered in response to the Congressional prohibition against departure from the published tariff rate *"by any device whatsoever"* (49 U.S.C. 6(7)).

> "Any and all means to accomplish the prohibited end are banned." *Union Pacific Ry. Co. v. United States*, 313 U.S. 450, 462 (1941).

Payments in the nature of the proposed non-tariff remittitur to car-owning shippers obviously reduce the *net* amount of the published freight charges paid by those shippers and inevitably produce a resulting advantage vis-a-vis other shippers using railroad cars. The "device" for departure from the published rates and the violation of 49 U.S.C. 6(7), 15(15) and 41(1) could hardly be more pronounced. And if the carriers are authorized, indeed ordered, to remit any part of their published charges, it can hardly be said that they have any duty to collect them in the first place.

CONCLUSION.

Left unreviewed, the lower Court's opinion stands for the following:

1) the Commission may in fact divide revenues without reference to the requirements of Section 15(6)(a);

2) there is no need for the carriers to publish demurrage tariffs, since demurrage is not a rate or charge;

3) if the carriers elect to publish and collect demurrage charges, they may remit such moneys in whole or in part to the shippers without fear of sanction under 49 U.S.C. 41(1); and

4) the Commission need not concern itself with time limitations established by the Congress since the reviewing courts are not likely to enforce such restrictions.

These petitioners include both those who will suffer and those who will benefit from the proposed remittitur. They are united, however, in a common belief that the Commission has exceeded its authority and that the lower court has erred in sustaining the agency.

This proceeding deserves a searching scrutiny by this Court. The writ should issue.

Respectfully submitted,

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Boston & Maine Corporation
Chesapeake & Ohio Railway Company
Chicago and North Western Transportation Company
Chicago, Milwaukee, St. Paul & Pacific Railroad
Chicago, Rock Island & Pacific Railroad Company
Chicago, South Shore and South Bend Railroad
Consolidated Rail Corporation
Delaware & Hudson Railway Company
Detroit Terminal Railroad Company
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Duluth, Missabe and Iron Range Railway Company
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APPENDIX B.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 77-1714

Baltimore and Ohio Chicago Terminal Railroad Company; Baltimore and Ohio Railroad Company; Belt Railway Company of Chicago; Bessemer & Lake Erie Railroad Company; Boston & Maine Corporation; Chesapeake & Ohio Railway Company; Chicago and North Western Transportation Company; Chicago, Milwaukee, St. Paul & Pacific Railroad; Chicago, Rock Island & Pacific Railroad Company; Chicago, South Shore and South Bend Railroad; Consolidated Rail Corporation; Delaware & Hudson Railway Company; Detroit Terminal Railroad Company; Detroit, Toledo & Ironton Railroad Company, Duluth, Missabe and Iron Range Railway Company; Elgin, Joliet and Eastern Railway Company; Florida East Coast Railway Company; Grand Trunk Western Railroad Company; Illinois Central Gulf Railroad; Indiana Harbor Belt Railroad Company; Kentucky & Indiana Terminal Railroad Company; Louisville and Nashville Railroad Company; Missouri Pacific Railroad Company; Norfolk & Western Railway Company; St. Louis-San Francisco Railway Company; St. Louis Southwestern Railway Company; Seaboard Coast Line Railroad; Soo Line Railroad Company; Southern Pacific Transportation Company; Southern Railway Company; Staten Island

Railroad Corporation; Terminal Railroad Association of St. Louis; Western Maryland Railway,

Petitioners

v.

United States of America and Interstate Commerce Commission,

Respondents

Central Vermont Railway, Inc.; Duluth, Winnipeg and Pacific Railway; and the Detroit and Toledo Shore Line Railroad Company,

Intervenors

Burlington Northern Inc. and Union Pacific Railroad Company,

Intervenors

Duval Sales Corporation, International Minerals & Chemical Corporation, Evans Products Company and Pullman Leasing Company,

Intervenors

The Texas Mexican Railway Company,

Intervenor

No. 77-1732

ALIQUIPPA AND SOUTHERN RAILROAD COMPANY; CHESTNUT RIDGE RAILWAY COMPANY; EAST ERIE COMMERCIAL RAILROAD; EAST JERSEY RAILROAD AND TERMINAL COMPANY; GETTYSBURG RAILROAD COMPANY; LAKE ERIE, FRANKLIN & CLARION RAILROAD COMPANY; McKEESPORT CON-

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NORTHERN RAILWAY COMPANY; MANUFACTURERS' JUNCTION RAILWAY COMPANY; MARINETTE, TOMAHAWK AND WESTERN RAILROAD COMPANY; MERIDIAN & BIGBEE RAILROAD COMPANY; MICHIGAN NORTHERN RAILWAY COMPANY, INC.; MIDDLETOWN AND NEW JERSEY RAILWAY COMPANY INCORPORATED; MINNEAPOLIS, NORTHFIELD AND SOUTHERN RAILWAY; MINNESOTA TRANSFER RAILWAY COMPANY; MISSISSIPPI EXPORT RAILROAD COMPANY; MODESTO AND EMPIRE TRANCTION COMPANY; MONTPELIER & BARRE RAILROAD COMPANY; NEVADA NORTHERN RAILWAY COMPANY; NEWBURGH AND SOUTH SHORE RAILWAY COMPANY (THE); NORTH LOUISIANA & GULF RAILROAD COMPANY; OREGON & NORTHWESTERN RAILROAD COMPANY; PEARL RIVER VALLEY RAILROAD COMPANY; PECOS VALLEY SOUTHERN RAILWAY COMPANY (THE); PORT HURON AND DETROIT RAILROAD COMPANY; PRESCOTT AND NORTHWESTERN RAILROAD COMPANY (THE); PROVIDENCE AND WORCESTER COMPANY; RIVER TERMINAL RAILWAY COMPANY (THE); SABINE RIVER & NORTHERN RAILROAD COMPANY; SALT LAKE, GARFIELD AND WESTERN RAILWAY COMPANY; SAND SPRINGS RAILWAY COMPANY; SANDERSVILLE RAILROAD COMPANY; SAVANNAH STATE DOCKS RAILROAD COMPANY; STOCKTON TERMINAL AND EASTERN RAILROAD; TERMINAL RAILWAY ALABAMA STATE DOCKS; TEXAS & NORTHERN RAILWAY COMPANY; TEXAS, OKLAHOMA & EASTERN RAIL-

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Petitioners

v.

UNITED STATES OF AMERICA and THE INTERSTATE COMMERCE COMMISSION,

Respondents

DUVAL SALES CORPORATION, INTERNATIONAL MINERALS & CHEMICAL CORPORATION, EVANS PRODUCTS COMPANY AND PULLMAN LEASING COMPANY,

Intervenors

THE TEXAS MEXICAN RAILWAY COMPANY,

Intervenor

On Petition for Review of an Order of the Interstate Commerce Commission

(Ex Parte No. 289)

Argued July 25, 1978

Before Adams, Weis and Higginbotham, *Circuit Judges*

(Opinion filed September 6, 1978)

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OPINION OF THE COURT

ADAMS, *Circuit Judge.*

Petitioners in these consolidated cases [1] request us to set aside an order of the Interstate Commerce Commission (ICC) entered on April 7, 1977, in Ex Parte No. 289, "Remittance of Demurrage Charges by Common Carriers of Property by Rail." [2] By its order, the ICC adopted a regulation requiring the remittance to freight car owners of all demurrage charges collected by the delivering carrier that are in excess of ten dollars per day per car.[3] Specifically, petitioners maintain that the order exceeds the statutory power of the agency; that it is arbitrary, capricious, and without rational basis; and that it fails to comply with the Administrative Procedure Act (APA) [4] and the Interstate Commerce Act (ICA).[5]

For the reasons set forth below, we deny petitioners' request.

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1. In No. 77-1714, a petition was filed on behalf of thirty-three railroad petitioners and four intervening railroads for review of the ICC's order in Ex Parte 289. In No. 77-1732, a petition for review was filed by the 214 member railroads of the American Short Line Railroad Association. Both petitions are brought pursuant to 28 U.S.C.A. §§ 2321, 2342, and 2344 (1978) to enjoin a final order of the ICC.

2. 353 I.C.C. 567 (1977); 42 Fed. Reg. 19146; 39390 (1977) (to be codified in 49 C.F.R. § 1254.10).

3. Demurrage is the charge imposed upon shippers and receivers for the detention of freight cars beyond the allotted free time period for loading and unloading. Traditionally, all demurrage payments have been made to and retained by the delivering carriers. Under the ICC order at issue here, these payments would continue, but the funds collected in excess of ten dollars per day per car would be remitted by the delivering railroads to the freight car owners.

4. 5 U.S.C.A. § 551 *et seq.* (1977 & Supp. 1978).

5. 49 U.S.C.A. § 1 *et seq.* (1949, 1951 & Supp. 1978).

I.

The regulation at issue is a recent attempt by the ICC to deal with the longstanding shortage in this country of railroad freight cars.[6] The car shortage, resulting from both an insufficient supply and an inefficient utilization of freight cars, is an outgrowth of the present national car-pool system. Under the system, the freight cars that are owned by *individual* railroads constitute a single, common pool, used by *all* rail carriers. Thus, the same loaded freight car is transported over the lines of different connecting carriers to the ultimate destination point. While more efficient than the earlier practice of shifting freight from the car of one carrier to the car of another, the pool system has at the same time made it more advantageous economically for railroads to utilize the freight cars of the originating carriers than to purchase and maintain their own. The national freight car shortage is the acknowledged result.[7]

During the past several years, the ICC tas taken a number of major actions in an attempt to ease the car shortage: (1) it has adopted various "car service" rules to regulate the placement and movement of freight cars; [8] (2) it has established a uniform schedule of "per diem" charges, which are those incurred daily by one railroad for

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6. *See* United States v. Florida E. Coast Ry. Co., 410 U.S. 224, 230-31 (1973); United States v. Allegheny-Ludlum Steel Corp., 406 U.S. 742, 743-46 (1972); Note, *The Freight Car Shortage and ICC Regulation*, 85 *Harv. L. Rev.* 1583 (1972).

7. *See, e.g.*, United States. v Allegheny-Ludlum Steel Corp., 406 U.S. at 745-46.

8. *See, e.g.*, ICC v. Oregon Pac. Indus., Inc., 420 U.S. 184 (1975); United States v. Allegheny-Ludlum Steel Corp., 406 U.S. 742; Reading Co. v. Community Credit Corp., 289 F.2d 744 (3d Cir. 1961).

the use of another's cars; [9] (3) it has added an "incentive" element to the basic per diem rate; [10] and (4) it has imposed an increase in demurrage charges.[11]

Ex Parte No. 289, the proceeding in question here, was instituted in October 1972, to determine whether remittance of the penalty portion [12] of the demurrage charges to the carriers owning the cars would create an added incentive for such carriers to acquire additional cars. Following notice in the *Federal Register* [13] and submission of written statements by a number of the ninety-seven participating parties, the ICC, on April 25, 1975, issued its Interim Report.[14] The Report adopted the principle of the proposed remittance rule and reopened the proceeding for receipt of additional evidence regarding the plan's feasibility and costs. Following notice of the proposed further rulemaking,[15] one hundred-eighteen parties submitted additional information to the ICC.

On April 7, 1977, the ICC issued its Report and Order in Ex Parte No. 289.[16] It concluded that adoption of the

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9. *See* Union Pac. R.R. Co. v. United States, 300 F. Supp. 318 (D. Nev. 1969); Boston & Me. R.R. v. United States, 297 F. Supp. 615 (D. Mass.), *aff'd per curiam*, 396 U.S. 27 (1969).

10. *See* United States v. Florida E. Coast Ry. Co., 410 U.S. at 224, *on remand*, 368 F. Supp. 1009 (M.D. Fla. 1973), *aff'd mem.*, 417 U.S. 901 (1974).

11. *See* General Mills, Inc. v. United States, 364 F. Supp. 1278 (D. Minn. 1973).

12. Demurrage charges consist of both penalty and compensatory elements. *See* ICC v. Oregon Pac. Indus., Inc., 420 U.S. at 189-191. The latter element is that portion of the demurrage charge which serves to compensate the railroad for the additional per diem payments it must make to the car owner as a result of the loading or unloading delay. The remainder of the demurrage charge is understood as the penalty portion.

13. 37 Fed. Reg. 22884 (1972).

14. 349 I.C.C. 411 (1975).

15. 40 Fed. Reg. 18797 (1975).

16. 353 I.C.C. 567 (1977).

proposed remittance rule would be beneficial to the public and the rail industry, as well as administratively feasible. Consequently, the agency directed that the rule become effective on July 6, 1977. However, the effective date was subsequently stayed by the ICC pending judicial review.

II.

A.

The principal argument made in support of the petition to set aside the order in question is that the ICC lacks a statutory base to promulgate the demurrage remittance rule. The ICC, in turn, contends that it does have the requisite authority under 49 U.S.C.A. § 1(6) (Supp. 1978), as amended by the Rail Revitalization and Regulatory Reform Act of 1976 (4R Act).[17]

The 4R Act added a provision to § 1(6) which states that "[d]emurrage charges shall be computed, and rules and regulations relating to such charges shall be established, in such a manner as to fulfill the national needs with respect to (a) freight car utilization and distribution, and (b) maintenance of an adequate freight car supply avail-

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17. Pub. L. No. 94-210, § 211, 90 Stat. 31, 46 (1976). In its Interim Report of April 1975, the Commission found that it had jurisdiction under three car service provisions of the ICA, 49 U.S.C.A. §§ 1(11), 1(14)(a), and 1(15) (1959 & Supp. 1978). Subsequent to the Report, the 4R Act was enacted, and on March 3, 1976, the ICC solicited comments on the effect of the new legislation. In its final Report and Order of April 1977, as well as in its brief submitted to this Court, the ICC, while continuing to assert that it has authority to promulgate the remittance rule under the three above-mentioned sections, relied principally upon the amended version of § 1(6). In light of our holding that § 1(6) provides the ICC with the necessary authority to promulgate the demurrage remittance rule in question it is unnecessary to decide whether jurisdiction might properly be founded upon §§ 1(11), 1(14)(a), and 1(15) as well.

able for transportation of property." [18] Petitioners assert that the statutory directive that "demurrage charges shall be computed" cannot properly be interpreted to authorize the ICC to "divide" demurrage revenues between the delivering carrier and the owner of the car.

In analyzing a question of statutory construction, the Supreme Court has said that it accords deference to the interpretation given the statute by the officers or agency charged with its administration. *Udall v. Tallman.*[19] While the agency's interpretation is by no means controlling,[20] to sustain the ICC it is necessary only that we find

18. 49 U.S.C.A. § 1(6), (Supp. 1978), in full, provides:

> It is made the duty of all common carriers to the provisions of this chapter to establish, observe, and enforce just and reasonable classifications of property for transportation, with reference to which rates, tariffs, regulations, or practices are or may be made or prescribed, and just and reasonable regulations and practices affecting classifications, rates or tariffs, the issuance, form and substance of tickets, receipts, and bills of lading, the manner and method of presenting, marking, packing and delivering property for transportation, the facilities for transportation, the carrying of personal, sample, and excess baggage, and all other matters relating to or connected with the receiving, handling, transporting, storing, and delivery of property subject to the provisions of this chapter which may be necessary or proper to secure the safe and prompt receipt, handling, transportation, and delivery of property subject to the provisions of this chapter upon just and reasonable terms, and every unjust and unreasonable classification, regulation, and practice is prohibited and declared to be unlawful. Demurrage charges shall be computed, and rules and regulations relating to such charges shall be established, in such a manner as to fulfill the national needs with respect to (a) freight car utilization and distribution, and (b) maintenance of an adequate freight car supply available for transportation of property.

19. 380 U.S. 1, 16 (1965). *Accord*, Batterton v. Francis, 432 U.S. 416, 424 (1977); Lehigh & New Eng. Ry. Co. v. ICC, 540 F.2d 71, 80 (3d Cir. 1976), *cert. denied*, 429 U.S. 1061 (1977); Lucas Coal Co. v. Interior Bd. of Mine Operations Appeals, 522 F.2d 581, 584 (3d Cir. 1975).

20. *See* Batterton v. Francis, 432 U.S. at 424.

its interpretation to be a reasonable one.[21] As *Tallman* recognized, "we need not find that [an agency's] construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings." [22]

Petitioners in the present situation argue that the plain meaning of the phrase "demurrage charges shall be computed" should control, that previous use of the term by the ICC does not indicate an understanding that it confers upon the agency the power to divide demurrage revenues, and that the division of revenues is such a substantial change from prior practice that an express authorization by Congress to divide demurrage charges is required.

While the language of § 1(6) does not specifically authorize remittance to car owners, it is equally clear that the statute does not prohibit such an arrangement. By focusing solely upon the phrase "shall be computed", petitioners tend to restrict what appears to be the rather broad authorization granted to the ICC by the 1976 amendments to § 1(6).[23] Indeed, the provision not only directs the ICC to compute demurrage charges with the purpose of enhancing freight car supply, utilization, and distribution, but also mandates the agency to establish "rules and regulations relating to such charges".

The legislative history of the 4R Act further indicates the appropriateness of a broad reading of the amendment to § 1(6). The statute encompassing the provision was enacted by Congress for the general purpose of revitalizing

21. *See* Udall v. Tallman, 380 U.S. at 16.

22. Udall v. Tallman, 380 U.S. at 16, *quoting with approval* Unemployment Compensation Comm'n v. Aragon, 329 U.S. 143, 153 (1946).

23. As this Court stated in Lehigh and New Eng. Ry. Co. v. ICC, 540 F.2d at 80, "[s]urely the scope of the Commission's responsibilities under the Act requires a generous construction of its statutory authority."

a sagging railroad industry.[24] It was the declared policy of Congress, among other things, to balance the needs of carriers, shippers, and the public; to help place the nation's railroads in a position competitive with that of other modes of transportation, so as to promote more adequate and efficient transportation services; and to increase the attractiveness of investing in railroads and rail-service-related enterprises.[25]

One of the means of fulfilling these aims was the amendment pertaining to demurrage charges. That provision, comprising only eight lines in the 120-page statute, understandably did not attract much congressional comment.[26] The few portions of the legislative history that deal with the demurrage provision, however, lend support to the ICC's broad interpretation of § 1(6).

During the initial review of the railroad reform legislation in the House of Representatives, the Committee on Interstate and Foreign Commerce was informed of the ICC's pending consideration of the demurrage remittance rule in Ex Parte No. 289, and it gave no indication of its disapproval.[27] This is of special significance in light of the

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24. *See* Pub. L. No. 94-210, § 101, 90 Stat. 31, 33 (1976) (codified at 45 U.S.C.A. § 801 (Supp. 1978).

25. *Id.*

26. The debates on the floors of the Senate and House of Representatives fail to offer any insight into congressional thought with regard to the demurrage provision, for the section was never mentioned other than in the reading of the bill. Rather, the debates focused on the Final System Plan and other provisions of the 4R Act involving financial assistance by the federal government to the railroads. *See* 121 Cong. Rec. 38117, 38441, 41334, 41888, 42169 (1975); 122 Cong. Rec. H92, S271, S741, H401 (daily eds. Jan. 20, 21 & 28, 1976).

27. The Committee received a letter from ICC Acting Chairman O'Neal with his comments on the proopsed 4R Act. In his analysis of the demurrage provision, the Acting Chairman stated:

> Another proceeding, Ex Parte No. 289, *Remittance of Demurrage Charges by Common Carriers of Property by Rail*, con-

Supreme Court's holding in *Zuber v. Allen*[28] that an agency's interpretation of the statute it is charged with implementing "carries most weight when the administrators participated in drafting and directly made known their views to Congress in committee hearings . . . . In such circumstances, absent any indication that Congress differed with the responsible department, a court should resolve any ambiguity in favor of the administrative construction, if such construction enhances the general purposes and policies underlying the legislation."[29] In addition, we find substantial support for the ICC's interpretation of the demurrage provision in the Joint Explanatory Statements of the Conference Committee. It declared with regard to the section: "Other amendment made by this rule: . . . *requires* the Commission to establish rules and regulations for the computation of demurrage charges, so that freight utilization is maximized and *car owners receive adequate compensation* . . . ."[30]

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27. (Cont'd.)

cerns a proposed rule requiring remittance to the car owner by a non-owning road of all demurrage charges in excess of $10 per day per car. The purposes of the proposals are to create an added incentive for the car owner to acquire additional cars and to remove any inducement to the non-owner to encourage detention of foreign cars in order to benefit from collection of demurrage charges.

See Report of the Committee on Interstate and Foreign Commerce, H.R. Rep. No. 725, 94th Cong., 1st Sess. 240 (1975).

28. 396 U.S. 168 (1969).

29. *Id.* at 192.

30. Final Conference Reports, S. Rep. No. 595 and H.R. Rep. No. 781, 94th Cong., 2d Sess. 135, *reprinted in* [1976] U.S. Code & Ad. News 149, 150 (emphasis added). Similar statements are found in other committee reports which discussed the demurrage provision. *See* Conference Reports, S. Rep. No. 585 and H.R. Rep. No. 768, 94th Cong., 1st Sess. 128 (1975); Report of the Committee on Interstate and Foreign Commerce, H.R. Rep. 725, 94th Cong., 1st Sess. 73 (1975).

In light of this statutory history, and the goals of the legislation, we are unable to say that the ICC's view that § 1(6) authorizes it to promulgate the present demurrage remittance rule is an unreasonable one.

B.

Petitioners also contend that the order in Ex Parte No. 289, even if within the ICC's power, must be set aside as arbitrary and capricious and as unsupported by substantial evidence. In this regard, petitioners assert that the applicable standard of review is the one established by the APA, 5 U.S.C.A. § 706 (1977), and that the ICC determination, by failing to demonstrate a sufficient nexus between demurrage remittance and improved freight car utilization and supply, cannot survive such review.

Section 706(2) requires, *inter alia*, that the reviewing court "hold unlawful and set aside agency action, findings, and conclusions found to be—(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; . . . [or] (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute. . . ." [31] Since the present proceeding involves notice and comment rulemaking under 5 U.S.C.A. § 553 (1977),[32] and is not one "reviewed on the record of an agency hearing provided by statute," [33] the "substantial

31. *Id.* 5 U.S.C.A. §§ 556 and 557 (1977) establish procedural requirements for hearings mandated by §§ 553 or 554.

32. 5 U.S.C.A. § 551 (1977) defines "rule" as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency. . . ." "Rule making" is defined in that same section as "agency process for formulating, amending, or repealing a rule." *Id.* Ex Parte No. 289 clearly falls within this category of proceeding.

33. 5 U.S.C.A. § 706(2)(E) (1977).

evidence" test of § 706(2)(E) would not appear to be applicable.[34] As we recently stated in *Ford Motor Co. v. United States*,[35] the basic standard of review in proceedings such as this one is the "arbitrary and capricious" standard of § 706(2)(A).[36]

It is generally settled that the scope of review of agency actions under § 706(2)(A) is narrow.[37] A unanimous Supreme Court noted in *United States v. Allegheny-Ludlum Steel*[38] that "[w]e do not weigh the evidence introduced before the Commission; we do not inquire into the wisdom of the regulations that the Commission promulgates, and we inquire into the soundness of the reasoning

34. *See, e.g.*, Weinberger v. Hynson, Westcott & Dunning, Inc., 412 U.S. 609, 622 n.19 (1973); American Iron and Steel Inst. v. EPA, 568 F.2d 284, 296 (3d Cir. 1977); Asphalt Roofing Mfrs. Ass'n v. ICC, 567 F.2d 994, 1002 n.5 (D.C. Cir. 1977); National Nutritional Foods Ass'n v. Weinberger, 512 F.2d 688, 700-701 (2d Cir.), *cert. denied*, 423 U.S. 827 (1975); K. Davis, Administrative Law of the Seventies, § 29.01-3 (1976).

35. 569 F.2d 196 (3d Cir. 1977), *cert. denied*, 46 U.S.L.W. 3753 (June 6, 1978).

36. *See id.* at 198.

37. *See, e.g.*, Bowman Transp. v. Arkansas Best Freight Sys., 419 U.S. 281, 285-86 (1974); United States v. Allegheny-Ludlum Steel Corp., 406 U.S. at 749; Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971); Ford Motor Co. v. United States, 569 F.2d at 198-99. Several courts of appeals, including this one, have observed that in notice and comment rulemaking the "arbitrary and capricious" and "substantial evidence" criteria tend to converge. *See, e.g.*, Synthetic Organic Chem. Mfrs. Ass'n v. Brennan, 503 F.2d 1155, 1158 (3d Cir. 1974), *cert. denied*, 420 U.S. 973 (1975); Associated Indus., Inc. v. United States Dep't of Labor, 487 F.2d 342, 350 (2d Cir. 1973) (Friendly, J.). *See generally* Friendly, *"Some Kind of Hearing"*, 123 U. of Pa. L. Rev. 1267, 1313 (1975); Pedersen, *Formal Records and Informal Rulemaking*, 85 Yale L.J. 38, 46-51 (1975). Of course, an agency decision without *any* evidentiary support, in the administrative record will not be upheld. The evidence presented, however, need only establish a rational basis, rather than substantial support, for the agency action. *See* Almay Inc. v. Califano, 569 F.2d 674, 680-81 (D.C. Cir. 1978).

38. 406 U.S. 742 (1972).

by which the Commission reaches its conclusions only to ascertain that the latter are rationally supported." [39] Accordingly, we examine the evidence and arguments offered by the ICC in order to determine whether the demurrage remittance rule is "rationally supported."

In its Interim Report and final Report and Order, the ICC extensively discussed the arguments of both proponents and opponents of the remittance rule, and concluded that the rule would likely achieve its intended purpose of increasing freight car supply and utilization. Its reasoning was forthright, relying upon "the fundamental economic proposition that a greater return on an investment will provide an increased incentive to invest in that item, whether it be stocks, cars, or as in this case, freight cars." [40] While admitting that return on investment would be only one of several factors affecting a decision whether to purchase freight cars, the ICC claimed that the rule would at least

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39. *Id.* at 749. *Accord,* Ford Motor Co. v. United States, 569 F.2d at 199.

40. 353 ICC at 589. As the ICC continued:

> As demurrage regulations presently exist, the delivering carrier who may not own one freight car, is nevertheless entitled to the entire demurrage charge even though this sum may far exceed any costs incurred. In addition, there is no indication that this demurrage revenue is presently being used by the delivering road to purchase additional cars. This money is, therefore, a bonus to a carrier who has no interest in whether or not a car is being detained. However, the car owner, whether private or foreign road, has its equipment detained and unavailable for further use, and thereby loses revenue. This is especially true of private car owners who do not receive per diem but a mileage allowance. This remitted amount which table 5 shows is approximately $22 for each excess day ($11 if it is assumed that Service Order No. 1124 inflated demurrage by 50 percent), which SP estimates to be approximately $62.50 a car annually, will be an added dividend to car owners. When these figures are multiplied by the vast number of cars in the transportation system, the rule will certainly have a significant positive impact on car supply.

Id.

tend to encourage such decision. Moreover, the agency concluded that the remittance rule would have an affirmative effect upon the supply of cars. Pointing to evidence adduced in earlier proceedings that large sums of demurrage charges remained uncollected by the carriers, the ICC reasoned that the requirement of the remittance rule, which is based on billed rather than collected demurrage charges, would likely encourage carriers to be more rigorous in *their* collection of the charges. This, the agency maintained, would enhance the general regulatory effect of the demurrage system.[41]

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41. 349 ICC at 435-36. The ICC elaborated as follows:

> The shipper to whom the carrier delivers a car pays the demurrage. He has control of the car and determines how long he will hold it. One of the factors he will consider in deciding how long to detain a car is the amount of the demurrage charges.
>
> This proposal does not alter the level of demurrage charges. It merely shifts the payment of part of these charges from one group, the receiving carrier, to another, the car owner. Since it can make no difference to the shipper whether he pays the charge to one party rather than another, it may appear that the implementation of this proposal would have no impact on car utilization.
>
> However, evidence collected by the Commission staff in another proceeding suggests that this proposal may have a positive impact on car utilization. The Commission has issued a Notice of Proposed Rulemaking and Order in Ex Parte No. 285, *Maintenance of Records Pertaining to Demurrage, Detention, and Other Related Accessorial Charges by Rail Common Carriers of Property.* In that notice and order, served August 16, 1972, we indicated that inquiries by the Commission's field staff revealed that large sums of money resulting from demurrage charges remained uncollected by the carriers or that such debts were canceled because carriers did not maintain adequate records. Other indications that carriers do not always collect demurrage charges appear in *Demurrage Rules and Charges, Nationwide,* 340 I.C.C. 83, 92 (1971), and *Incentive Per Diem Charges—1968,* 337 I.C.C. 217, 233 (1970).
>
> When carriers do not actually collect demurrage charges, an important economic incentive for shippers to release cars with dispatch is lost. Under the proposal herein, the car owner would receive part of these demurrage payments.

Further, the ICC carefully weighed the benefits of the proposed rule against the claims of its opponents that demurrage remittance, by reducing railroad revenues and requiring additional administrative expenses, would place undue economic burdens upon many carriers.[42] The ICC found that many of the projections set forth by the objecting carriers were based on short-term start-up expenses, and therefore were subject to question. Thus, the agency concluded that the benefits of the proposed rule outweighed the burdens.[43] Having reviewed the ICC's rea-

41. (Cont'd.)

> Faced with the necessity of paying these sums to the car owner, the delivering carrier would have added motivation to pursue the charges against the shippers and receivers. The incentive to release cars would be greater and some improvement in car utilization could reasonably be expected.

Id.

42. The short-line railroads, in particular, have expressed their strong concern about the possible detrimental impact of the remittance scheme upon their operations. Their claims, whether legitimate or not, are not determinative. Rather, they are but one of several considerations relevant to ascertaining the rationality of the ICC's rule. As a unanimous Supreme Court reasoned in a proceeding quite similar to the present one:

> It may be conceded that the immediate effect of the Commission's order will be to disrupt some established practices . . . , and on occasion to cause serious inconvenience . . . . If the Commission were thrusting these regulations upon an admittedly smoothly functioning transportation industry . . . the rationality of its action might well be open to question. But such is not the case.

United States v. Allegheny-Ludlum Steel, 406 U.S. at 753 (upholding car service rules requiring the return of freight cars in the direction of the lines of the railroads owning the cars).

43. 353 ICC 589-91. The ICC declared in its final report:

> In conclusion, we realize that the cost data submitted by many of the reporting roads is inflated and that many of the expenses are unsubstantiated. (For example, a carrier states that it needs four additional employees but it does not indicate how it arrived at this figure.) However, despite our reservations as to the accuracy of the cost data presented, even taking it at face value, we are nevertheless unable to find that

soning, we are unable to say that the agency's solution is not "rationally supported." [44]

C.

Petitioners further contend that the ICC's order in Ex Parte No. 289 must be set aside for failure to comply with certain procedural requirements of the APA, 5 U.S.C.A. § 553(c) (1977), and of the ICA, 49 U.S.C.A. § 17(14)(b) (Supp. 1978).

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43. (Cont'd.)
the costs of administering the rule are excessive. As can be seen from table 4, average startup expenses of $14,219 and annual expenses of approximately $0.90 for each excess demurrage day are not unreasonable, unjustifiable, or unduly burdensome. Even if expenses were slightly higher, the evidence of record still supports the finding that the costs of administering the rule are not prohibitive.

The record also indicates that in terms of cost-benefit, the proposed rule is justified. Table 5 shows that the total amount of demurrage that would have been remitted for the period July 1 through December 31, 1973, to private and foreign car owners by 42 roads is $40,387,455. Even if we discount the effects of Service Order No. 1124, which inflated this figure by an estimated 50 percent, $20,193,727 would still have been remitted to car owners during this 6-month period. This discounted amount would constitute between a $10 and $11 return on a car owner's investment for each excess demurrage day. When this amount is compared to the costs of administering the rule, it becomes evident that the costs are not so burdensome as to outweigh the rules's benefit in providing an incentive for the purchase of additional equipment and, thereby, in increasing car supply.

Id. at 590-91.

44. In light of the ICC's extensive discussion of the benefits and burdens of the demurrage remittance rule, we are also unable to accept petitioners' contention that the agency has failed to provide this Court with a basis for determining whether the proposed rule comports with the National Transportation Policy, 49 U.S.C.A. prec. § 1 (Supp. 1978). *See generally* A. L. Mechling Barge Lines, Inc. v. United States, 376 U.S. 375 (1964); Schaffer Transp. Co. v. United States, 355 U.S. 83 (1957).

1.

Section 553(c) provides in pertinent part that "[a]fter consideration of the revelant matter presented, the agency shall incorporate in the rules adopted a concise and general statement of their basis and purpose." It is the petitioners' position that this section requires that the statement by the agency be supported by more than conclusory assertions, and that the ICC remittance rule is invalid because of the agency's failure to comply with this requirement.

Those courts which have considered the issue agree that § 553(c) is designed to facilitate meaningful judicial review of agency action.[45] When engaging in such review, courts have expressed their intention to limit their scrutiny to the actual reasoning set forth by the agency.[46] Thus, *post hoc* rationalizations advanced in the course of judicial review have been considered insufficient bases for sustaining an administrative action.[47]

However, in recognition of the limited purpose of the statement requirement of § 553(c), the provision has not been seen as a vehicle for searching judicial oversight of

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45. *See, e.g.*, Tabor v. Joint Bd. for Enrollment of Actuaries, 566 F.2d 705, 709-12 (D.C. Cir. 1977); Alabama Ass'n of Ins. Agents v. Board of Governors of the Fed. Reserve Sys., 533 F.2d 224 (5th Cir. 1976), *amended*, 558 F.2d 729 (5th Cir. 1977), *cert. denied*, 46 U.S.L.W. 3541 (Feb. 28, 1978); *National Nutritional Foods Assoc'n v. Weinberger*, 512 F.2d at 701. *See generally* Pedersen, *Formal Records and Informal Rulemaking*, 85 Yale L.J. 38, 73-4 (1975); Note, *The Judicial Role in Defining Procedural Requirements for Agency Rulemaking*, 87 Harv. L. Rev. 782 (1974). *See also* Atchinson, T. & S.F. Ry. Co. v. Wichita Bd. of Trade, 412 U.S. 800, 807 (1973); SEC v. Chenery Corp., 332 U.S. 194, 196-97 (1947); American Iron & Steel Inst. v. EPA, 568 F.2d at 296-7; Dry Colors Mfrs. Ass'n Inc. v. Department of Labor, 486 F.2d 98, 104 n.8 (3d Cir. 1973).

46. *See* Tabor v. Joint Bd. for Enrollment of Actuaries, 566 F.2d at 710.

47. *Id.*

agency decision-making.[48] As the District of Columbia Court of Appeals made clear in *Tabor v. Joint Board for Enrollment of Actuaries*, the mere failure to publish the statement of the rule's basis and purpose at the same moment as the regulations are published does not constitute a violation of § 553(c).[49] Rather, "[t]he inquiry must be whether the rules and statement are published close enough together in time so that there is no doubt that the statement accompanies rather than rationalizes the rules."[50]

In the present situation, the ICC's notices in the *Federal Register* of the proposed further rulemaking and of the final rule themselves satisfy the requirement of § 553(c).[51] In addition, there can be little doubt that the ICC Interim Report as well as its final Report and Order more than fulfill the statutory purpose of facilitating judicial review.[52]

2.

The contention of petitioners regarding the time requirements set forth in the ICA, 49 U.S.C.A. § 17(14)(b) (Supp. 1978), presents a more difficult problem. That section provides: "*Within one year after February 5, 1976,* [the date of the enactment of this subdivision] the Commission shall conclude or terminate, with administrative finality, any *formal investigative proceeding* with respect to a common carrier by railroad which was instituted by the Commission on its own initiative and which has been

48. *Id.*

49. 566 F.2d at 711.

50. *Id.* at n.14.

51. *See* 40 Fed. Reg. 18797 (1975); 42 Fed. Reg. 19146 (1977).

52. The Supreme Court has previously found a "comprehensive" ICC report to "fully comply" with the requirement of § 553(c). *See* United States v. Allegheny-Ludlum Steel Corp., 406 U.S. at 747, 758.

pending before the Commission for a period of three or more years following the date of the order which instituted the proceeding." [53]

Petitioners argue that the proceeding here was a "formal investigative proceeding", that it was pending before the ICC for a period of more than three years subsequent to the initiation of the proceeding, and that it continued for more than one year after the enactment of § 17(14)(b). They maintain that the appropriate sanction for such a violation of the section is the setting aside or dismissal of the proceeding. Respondents, on the other hand, answer that the proceeding here was an informal one; that the ICC's Notice of Proposed Further and Amended Rulemaking and Order initiated a proceeding that was separate from that instituted in 1972 by the ICC's initial notice in Ex Parte No. 289; and thus that the time limitations were not transgressed. In any event, they insist that dismissal is neither required nor appropriate.

Recent opinions of several courts of appeals have consistently distinguished between "informal rulemaking" under the APA, 5 U.S.C.A. § 553 (1977), which need not be conducted with the procedural formalities of a trial, and "formal rulemaking" under 5 U.S.C.A. §§ 556 and 557 (1977), which is required to have an evidentiary hearing.[54] There is no disagreement among the parties here that Ex Parte No. 289 comes within the former category, that of "informal rulemaking." Respondents seek to establish that, because the proceeding in question is "informal" for purposes of the APA, it is also "informal" for purposes of the ICA, 49 U.S.C.A. § 17(14)(b) (Supp. 1978).

53. 49 U.S.C.A. § 17(14)(b) (Supp. 1978) (emphasis added).

54. *See, e.g.*, National Ass'n of Food Chains, Inc. v. ICC, 535 F.2d 1308, 1313 (D.C. Cir. 1976); Buckeye Power, Inc. v. EPA, 481 F.2d 162, 170 (6th Cir. 1973); Phillips Petroleum Co. v. FPC, 475 F.2d 842, 851 (10th Cir. 1973), *cert. denied*, 414 U.S. 1146 (1974).

We disagree. The ICC offers no evidence or reasoning to support the assertion that Congress, when drafting § 303 of the 4R Act, which amended the procedural requirements of the *ICA*, had in mind the characterization that several courts have given to notice and comment rulemaking under the *APA*, 5 U.S.C.A. § 553. In the absence of any evidence, such a congruence seems to us implausible. While the purpose of the APA is to establish general procedural guidelines for a broad range of administrative agencies,[55] the ICA applies to a much narrower set of circumstances. Thus, it is reasonable to believe that Congress, when drafting the 4R Act amendments to the ICA, was thinking in terms of the particular problems of the ICC and the railroad industry.[56]

Indeed, such an interpretation of congressional intent is affirmatively supported by the available legislative history of § 17(14)(b). Paragraph (14)(b) was added to § 17 of the ICA in 1976, as part of Congress' broad attempt in the 4R Act to expedite ICC procedures. Congress was particularly concerned with the lengthy delays traditionally accompanying railroad-related matters. Thus, in § 303(a) of the 4R Act, 49 U.S.C.A. § 17 (Supp. 1978), deadlines were established by Congress for the completion of evidentiary proceedings by ICC sub-units, the submission of initial reports to the full ICC, and the consideration and final disposition of administrative appeals. Furthermore, in § 303(b) of the 4R Act, Congress established deadlines for the disposition of "any formal investigative proceeding with respect to a common carrier by railroad." We are unable to find any indication, either on the face of the 4R Act or in the legislative history, that Congress intended

55. *See* Wong Yang Sung v. McGrath, 339 U.S. 33 (1950).

56. This is evident from the text of the 4R Act itself. *See* Pub. L. No. 94-210, 90 Stat. 31 (1976).

proceedings such as Ex Parte No. 289 to be exempt from a statutory time requirement.[57]

It is not without significance that the ICC, in its annual reports to Congress, has consistently designated notice and comment rulemaking proceedings such as the present one as "formal proceedings".[58] In contrast, informal proceedings have included such ICC activities as applications for temporary authority to operate a motor vehicle, applications to deviate from regular routes, and applications for temporary authority to lease or control. It is most likely that it was this categorization of proceedings that Congress had in mind when drafting § 17(14)(b).

Consequently, we hold that Ex Parte No. 289 constituted a "formal investigative proceeding" under the ICA, 49 U.S.C.A. § 17(14)(b), and that the statute's time requirements are therefore applicable.[59]

Nevertheless, we do not believe that the ICC's failure in this case to comply with the statutory deadline requires us to dismiss the proceedings. Section 17(14)(b), applying to proceedings initiated prior to the enactment of that

57. Indeed, that Congress intended § 17(14) to be applied broadly is indicated by the congressional comments, although few in number, that were made during the drafting of the section. *See, e.g.*, Final Conference Report, S. Rep. No. 595 and H.R. Rep. No. 781, 94th Cong., 2d Sess. 162: "The conference substitute follows the House bill except that it incorporates the Senate provision that . . . all proceedings instituted by the Commission shall be concluded with administrative finality, within 3 years after such proceeding was initiated."

58. *See, e.g.*, 91 ICC Ann. Rep. 111 (1978); 89 ICC Ann. Rep. 101-2 (1976).

59. We decline to accept the ICC's contention that Ex Parte No. 289 was actually two proceedings. The ICC claims that the April 1975 Notice of Proposed Further and Amended Rulemaking began a new rulemaking proceeding which merely capitalized on the efforts of the earlier activity. In light of the ICC's own language in the Interim Report and the April 1975 notice to the effect that the reopening was simply a continuation of the earlier proceeding, we find the ICC's argument before us to be unconvincing.

section, contains no express sanction for noncompliance as does § 17(14)(a), which pertains to ICC investigations begun since the provision's enactment.[60] This distinction in the language of the two sections indicates a desire on the part of Congress not to place ongoing proceedings under the same absolute time limit as proceedings instituted subsequent to the enactment of the 4R Act.

Furthermore, we are unconvinced that, as an equitable matter, injunctive relief barring enforcement of the ICC's order would be at all appropriate in this instance. While § 17(14)(b) evidences a congressional desire to eliminate delay in ongoing ICC proceedings, this purpose is but one of several that animated the 4R Act. Accordingly, it is necessary to balance the congressional aim of eliminating delay against the equally strong goals of revitalizing the nation's railroad system and alleviating the boxcar shortage. In light of these competing purposes, and of the vast resources that have obviously been expended in the course of Ex Parte No. 289, to enjoin the proceeding at this juncture would appear to be inappropriate. Furthermore, petitioners have failed to offer any evidence that they have been unduly prejudiced by the additional delay of two months beyond the statutory limit.[61]

We therefore hold that, while the ICC has exceeded the time limitations established by § 17(14)(b), dismissal here is neither required nor warranted.

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60. 49 U.S.C.A. § 17(14)(a) (Supp. 1978) provides: "Any formal investigative proceeding with respect to a common carrier by railroad which is instituted by the Commission after February 5, 1976, shall be concluded by the Commission with administrative finality within 3 years after the date on which such proceeding is instituted. Any such proceeding which is not so concluded by such date shall automatically be dismissed."

61. Obviously, such a demonstration of prejudice would have been particularly difficult for petitioners to make, since the two-month delay beyond the statutory limit merely served to further postpone the eventual enforcement of the order to which they object.

D.

Petitioners' final claim is that the ICC rule, by including private car owners in the demurrage remittance scheme,[62] permits the payment of unlawful rebates in violation of 49 U.S.C. §§ 15(15)[63] and 41(1).[64] It is contended that these sections will be violated by the order, since the payment by a railroad for the use of a private freight car will exceed the owner-shipper's cost of furnishing the car, and since the receiving carrier will in effect be paying an allowance which will not be published in its tariffs for the use of a car.

We have given careful consideration to these arguments and conclude that petitioners have misconstrued the purposes of § 15(15) and § 41(1), as well as the concept of demurrage. Sections 15(15) and 41(1) were designed to ensure reasonable and nondiscriminatory rates and charges, and to prevent any type of departure from published trans-

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62. In its final Report and Order, the ICC reasoned that: "An increasing percentage of the Nation's carrier fleet is owned by private interests. The evidence shows that between 1972 and 1974 private car owners and shippers added 35,711 cars to the transportation system. These investors should receive a fair return on their investment as well as carriers." 353 I.C.C. at 594.

63. 49 U.S.C.A. § 15(15) (Supp. 1978) provides: "If the owner of property transported . . . directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be published in the tariffs . . . and shall be no more than is just and reasonable, and the Commission may . . . determine what is a reasonable charge as the maximum to be paid . . . ."

64. 49 U.S.C.A. § 41(1) (Supp. 1978) makes it unlawful "to offer, grant, or give, or to solicit, accept, or receive any rebate, concession, or discrimination in respect to transportation of any property . . . whereby any such property shall by any service whatever be transported at a less rate than that named and published by such carrier . . . or whereby any other advantage is given or discrimination practiced."

portation rates.[65] In contrast, the essential nature of demurrage is that of a car service regulation.[66] Consequently, we do not believe that a demurrage charge can properly be understood as a "rate" under § 41(1), or as a "charge" as that term is used in § 15(15). Unlike the use of the terms in those provisions,[67] demurrage remittance relates not to rail carriers' property, but to excessive delay caused by the shipper or receiver in the loading or unloading of freight cars. Furthermore, it is neither a "charge and allowance" paid by the railroads for use of freight cars nor a reduction of the railroads' rates for owner-shippers. Rather, demurrage is a cost imposed upon the receiver, the penalty portion of which will be transmitted to the owner by the delivering carrier.

As Judge Prettyman observed in his oft-quoted opinion in *Iversen v. United States*: [68]

> [D]emurrage charges are in part compensation and in part penalty; . . . in full character they are neither, *not being rates as that term is used in connection with rate-making*, nor penalties as that term is used in respect to penal impositions. They are *sui generis*. Historically, textually, in purpose and in content, they are an integral part of the established rules and regulations relating to the use and movement of cars. From the beginning they have been sustained as rules and regulations. They *could not have been sustained as carrier charges* or as penalties.[69]

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65. *See* United States v. Braverman, 373 U.S. 405, 406 (1963) (unanimous); El Dorado Oil Works v. United States, 328 U.S. 12 (1945).

66. *See* ICC v. Oregon Pac. Indus., Inc., 420 U.S. 184, 190 (1975) (unanimous).

67. *See* notes 64 and 65 *supra*.

68. 63 F. Supp. 1001 (D. D.C. 1946), aff'd mem., U.S. 767 (1946).

69. *Id.* at 1005, *cited with approval* in ICC v. Oregon Pac. Indus., Inc., 420 U.S. at 190 n.7 (emphasis added). In reaching

As a result, we are unable to say that the inclusion of private car owners in the ICC's demurrage remittance order is a violation of the ICA.

III.

For the reasons herein set forth, the petition to set aside the order of the ICC in Ex Parte No. 289 will be denied.

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69. (Cont'd.)
this conclusion, Judge Prettyman relied in part on the opinion of the Virginia Supreme Court of Appeals in Norfolk & W.R. Co. v. Adams, Clement & Co., 90 Va. 393, 18 S.E. 673 (1894). His discussion of that case is of particular relevance to the present proceeding:

> In 1894 the Virginia Supreme Court of Appeals considered the validity of a demurrage charge in view of a state statute which forbade a railroad to charge any fee or commission "other than the regular transportation fees, storage, and other charges authorized by law." The official report of the matter says:
>
> "The company had made a rule, of which plaintiffs had notice, that a charge of $1 per car per day would be made for every detention of a car for the purpose of loading or unloading beyond seventy-two hours from the time that the car was placed at the disposal of the shipper or consignee, as the case might be."
>
> The court said:
>
> "It [the demurrage charge] is neither a transportation charge, nor a storage charge, nor a terminal charge, nor a subterfuge for adding to the cost of transportation in excess of the rates prescribed."
>
> The court sustained the charge on the ground that after allowance of a reasonable time for unloading, the railroad "can make reasonable rules and regulations and charges for such service as bailee, as it may see fit," and said, "Such charges are not carrier charges in the meaning intendment, or prescription of the statute."
>
> Thus, the original support for the right of a railroad to impose a demurrage charge was that such charge constituted a reasonable rule and regulation in respect to the use of the car, the purpose being to prevent delay in loading and unloading.

Iversen v. United States, 63 F. Supp. 1003-4.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 77-1714 and 77-1732

BALTIMORE AND OHIO CHICAGO TERMINAL RR. CO., et al.
Petitioners in 77-1714

ALIQUIPPA AND SOUTHERN RR. CO., et al.,
Petitioners in 77-1732

v.

U.S.A. and INTERSTATE COMMERCE COMMISSION,
Respondents

SUR PETITION FOR REHEARING EN BANC

Present: SEITZ,* *Chief Judge*, ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, GARTH and HIGGINBOTHAM, *Circuit Judges*

The petition for rehearing filed by Petitioners in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By THE COURT,
ARLIN M. ADAMS
Circuit Judge

Dated: October 5, 1978

* Chief Judge Seitz recused in No. 77-1714. Hon. Max Rosenn recused in both cases.

Served April 25, 1975

INTERSTATE COMMERCE COMMISSION

EX PARTE NO. 289

REMITTANCE OF DEMURRAGE CHARGES BY COMMON CARRIERS OF PROPERTY BY RAIL

Decided March 28, 1975

Upon investigation, adoption of a rule requiring remittance to the freight car owner by a nonowning railroad, on whose lines a car is being detained under demurrage, of all demurrage charges collected in excess of $10 per car per day, found warranted in principle. Proceeding reopened to develop data concerning the feasibility of implementation of a rule.

Leonard D. Brown, Oliver Callson, H. Richard George, R. M. Heinan, James J. Irlandi, Marvin R. Johns, A. E. Leitherer, John G. McGowan, Frederic W. Mild, Robert P. Post, A. T. Walters, Edwin M. Wheeler, and *G. W. Wright* for private car owner or lessee proponents.

Curtis H. Berg, W. Donald Boe, Jr., William P. Higgins, William R. Power, and *John S. Walker, Jr.,* for carrier proponents.

Lionel Topaz for Richard W. Sabin, Public Utility Commissioner of Oregon, proponent.

Samuel P. Delisi, Kemper A. Dobbins, Hollis G. Duensing, Patrick E. Hackett, Richard A. Hollander, James L. Howe III, C. H. Johns, Howard D. Koontz, Albert W. Laisy, Sam H. Lloyd, John G. Makris, John MacDonald Smith, Robert Swajkos, William H. Teasley, Walter G. Treanor, T. M. von Sprecken, Malcolm C. Warnock, and *Sidney Weinberg* for carrier opponents.

Gordon P. MacDougall and *Israel Packel* for Commonwealth of Pennsylvania, opponent.

James C. Schultz, Jerome E. Sharfman, and *J. Thomas Tidd* for United States Department of Transportation, opponent.

INTERIM REPORT OF THE COMMISSION

O'NEAL, *Vice Chairman:*

This is a rulemaking proceeding instituted on our own motion pursuant to Part I of the Interstate Commerce Act (49 U.S.C. 1, *et seq.*), including sections 1(4), 1(5), 1(6), 1(10), 1(11), 1(13), 1(14), 1(15), 1(17), 1(21), 6(7), 13(4), and 15(1) thereof, the national transportation policy (49 U.S.C. preceding section 1) and the Administrative Procedure Act (5 U.S.C. sections 553 and 559) to determine whether facts and circumstances warrant adoption of the proposed regulation, or other regulations of similar purport.

The Notice of Proposed Rulemaking and Order, dated October 12, 1972, set forth the following rule for consideration: "The nonowning railroad, on whose lines a car is being detained under demurrage, shall remit to the railroad car owner all demurrage charges collected in excess of $10 per day."

In the Notice of Proposed Rulemaking, we indicated that the first increment of demurrage after expiration of free time, $10 per day, appeared adequate to compensate the delivering railroad for the payment of per diem charges and use of track space resulting from the detention of foreign freight cars on their lines, and to provide an incentive for the prompt loading and unloading of freight cars by shippers and receivers. Further assumptions underlying the proposal stated in the notice included: that retention of the amount in excess of $10 per day by the railroad

on whose lines the foreign freight car is detained does not comport with the purposes, goals, and objectives of the Interstate Commerce Act, the rules and regulations promulgated by the Commission thereunder, and the national transportation policy, in that the railroad owner of the car receives only a small portion of the demurrage charge through the per diem rate; that the nonowning railroad has little incentive to expedite return of the car when it retains demurrage collections exceeding its own per diem expenses on the car; that the owner is deprived of the use of the car to earn revenue, which revenue potential exceeds the per diem rate paid by the nonowning railroad for use of the car; and that as a result, the owner is discouraged from acquiring additional cars for revenue purposes. The purposes of the proposal are to create an added incentive for the railroad car owner to acquire additional cars and to remove any inducement to the nonowner railroad to encourage detention of foreign cars in order to benefit from collection of demurrage charges.

All common carriers of property by railroad subject to the Interstate Commerce Act (the Act) were made respondents and invited to submit comments on the proposal. Ninety-seven parties, including 64 rail carriers or carrier organizations, expressed interest in this proceeding. Twenty-six initial and seven reply statements were filed. Most carriers subsequently consolidated their views with those of the Association of America Railroads or the American Short Line Railroad Association. In addition, a few other parties also consolidated their views.

By order served April 17, 1973, petitions for clarification of the Notice of Proposed Rulemaking and Order filed by the Association of American Railroads, the Louisville and Nashville Railroad Company, the Grand Trunk Western Railroad Company, and the Atlanta and Saint Andrews Bay Railway Company were denied.

For convenience we will not refer to the carriers as respondents but will separate them, as well as the other participants herein, into three categories according to their major viewpoints. They are (1) carrier proponents, (2) private car proponents, and (3) opponents, who consist mainly of carriers and carrier organizations.[1]

Several shippers or companies which own or lease private freight cars [2] (hereinafter called private car proponents) appeared in support of the proposed rule, and advocated an extension of it to require remittance of excess demurrage to private car owners or lessees as well as to railroad owners. Richard W. Sabin, Public Utility Commissioner of Oregon, advocated adoption of the proposal and supported the private car proponents' position. Three carriers [3] (hereinafter called carrier proponents) also support the proposed remittance scheme but not the proposed extension of it to private cars.

The Commonwealth of Pennsylvania and the United States Department of Transportation appeared in opposi-

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1. As we shall explain later, the Burlington Northern, Inc., a proponent, also opposes the suggestion of the private car proponents that the proposed rule be extended to include remittance of the excess demurrage charges to owners or lessees of private cars. Union Pacific Railroad Company states that its failure to comment on certain positions should not be taken as agreement therewith.

2. Allied Mills, Inc.; Bay State Milling Company; Cargill, Incorporated; Champion International Corporation; Garvey, Inc.; General American Transportation Corporation; General Mills, Inc.; Georgia-Pacific Corporation; Glass Container Manufacturers Institute, Inc.; International Multifoods Corporation; Miller Brewing Company; Peavey Company; Swift Edible Oils Company and Swift Fresh Meats Company, divisions of Swift and Company; The Fertilizer Institute; The Pillsbury Company; and Westinghouse Electric Corporation.

3. Burlington Northern, Inc., The Denver and Rio Grande Western Railroad Company, and the Union Pacific Railroad Company.

tion. Several carriers[4] also filed statements opposing the proposal. Moreover, most other carriers are presumed to oppose the rule in accordance with the objections set forth thereto in the statements of (1) the Association of American Railroads (AAR), to which certain members specifically excepted,[5] and (2) the American Short Line Railroad Association (ASLRA), (hereinafter collectively called opponents).

Before discussing the arguments presented on the merits, challenges to the Commission's jurisdiction and procedures will be addressed.

Jurisdiction

Certain parties, principally the AAR and ASLRA, argue that the Commission lacks jurisdiction to allocate demurrage revenues. They deny the existence of any authority for the instant proposal in the various sections of the Act cited by the Commission in the Notice of Proposed Rulemaking and Order. For example, these opponents contend that section 1(14)(a) is specific, limiting Commission authority to the prescription of incentive per diem, and that it provides no basis for increasing car supply by other devices. Furthermore, that section allegedly does

4. Robert W. Meserve, Trustee of Property of Boston and Maine Corporation, Debtor; Detroit Terminal Railroad Company; John F. Nash and Robert C. Haldeman, Trustees of the Property of Lehigh Valley Railroad Company, Debtor; Mississippi Export Railroad Company; Savannah State Docks Railroad Company; and the Western Pacific Railroad Company.

5. Atchison, Topeka and Santa Fe Railway Company, Burlington Northern, Inc., Missouri-Kansas-Texas Railroad Company, Pittsburgh and Lake Erie Railroad Company, and Union Pacific Railroad Company. Presumably the Denver and Rio Grande Western Railroad Company is also excepted, although it should be noted that its statement sometimes agrees with the AAR, particularly as to the issue of administrative feasibility. The Union Pacific's initial statement also agreed with several of the AAR's arguments, though not its conclusion.

not permit payments which would result in receipts above the present incentive per diem scheme to the car owners. The opponents assert that demurrage cannot be used for compensation because, among other things, unlike per diem it is not adjustable to the particular type of car.

Opponents state that allocations of revenues between carriers are specifically provided for in the Act where such allocation is intended, as, for example, in section 15(6). They depict section 1(15) as containing only emergency authority. Section 1(11) is regarded as restricted to the provision for reasonable compensation. Opponents similarly maintain that no authority can be based on the other sections of the Act relied upon in the Notice of Proposed Rulemaking because the specific language of those sections precludes their application to this proceeding. Thus, they conclude that no section of the act gives the Commission general authority either to act to increase car supply and utilization or to divide demurrage.

Counterarguments are made, principally by Burlington Northern, Inc. (Burlington Northern), and Union Pacific Railroad Company (Union Pacific) supporting Commission jurisdiction to enact the proposed rule on various grounds. They note that the furnishing of cars depends to a great extent on demurrage. They rely in part upon the car service rules as well as upon the suspension authority of section 1(15) of the Act as support for Commission jurisdiction. Additionally, they contend that sections 1 and 3 of the Act give the Commisssion power to regulate demurrage in order to prevent discrimination as well as for other purposes.

Conclusion.—Inasmuch as demurrage directly affects car service, and since it is the duty of carriers to establish, observe, and enforce just and reasonable rules, regulations, and practices with regard to car service, the Commission has jurisdiction under section 1(11) of the Act to oversee

demurrage rules and collection of demurrage charges and to determine the just and reasonable nature thereof. Section 1(14)(a) gives the Commission authority to establish reasonable rules, regulations, and practices with regard to car service by common carriers by railroad. The inclusion of provisions on incentive per diem in that section does not limit car service rules to that device, however. Section 1(15) also provides the Commission with a variety of powers with respect to car service when a car shortage, traffic congestion, or other emergency exists. Moreover, the national transportation policy directs, among other things, that the Commission foster sound economic conditions among carriers and discourage unfair or destructive competitive practices in preserving an adequate transportation system. The wide authority and variety of possible actions under car service rules is exemplified in prior proceedings, such as *Regulations for the Movement of Loaded Freight Cars,* 298 I.C.C. 371 (1956).

Finally, we point out that demurrage rules and regulations have been administered by the Commission since the turn of the century. See *Iversen v. United States,* 63 F. Supp. 1001, 1004 (D.C. 1946). Ample authority, therefore, clearly exists under our car service powers, among others, to support the Commission's jurisdiction in this proceeding.

Hearing

Various opponents of the proposed rule, principally the AAR and ASLRA, advance several arguments contending that an oral hearing is required in this proceeding. They maintain that this proceeding is only possible, if at all, under the authority of sections 15(1) or 15(6) of the Act, which would mandate a hearing in accordance with section 556 of the Administrative Procedure Act (APA). Alternatively, they submit that if jurisdiction is predicated

on any other grounds, a full hearing is needed by implication. Such parties regard this proceeding as essentially adjudicatory since they believe that the contemplated rule pertains to the division of revenues.

On a slightly different basis, these opponents contend that serious due process questions may arise if revenues are transferred among carriers under questionable substantive jurisdiction and after only limited procedural access to the affected parties. Therefore, they urge that this proceeding requires a full hearing and a major investigation on these grounds alone. Furthermore, they charge that adoption of the contemplated rule will threaten the financial integrity of some railroads, which rely heavily on the use of other carriers' cars, and that in any event the limited submissions under the procedures used herein will prejudice all railroads. They deem a true and full disclosure of facts possible only after full, oral hearing.

The opponents suggest that the agency has the burden of proof in this situation, making a full hearing mandatory. Among other problems asserted to dissuade what is characterized as precipitous action by the Commission are the matters raised in the petition for clarification, including questions regarding application of the rule and the handling of remittances in connection with average agreements.

Proponents of the rule, principally the Burlington Northern and Union Pacific, maintain that this is not a division of revenue case under section 15(6) of the Act or a ratemaking investigation, but instead is a car service proceeding within the purview of section 1(15). They state that demurrage is not a source of revenue. This proceeding is depicted as one to decide the rightful recipient of the penalty portion (or abitrary level) of demurrage by remittance, in which case such considerations as fair return and revenue requirements are remote. Proponents posit

that the conducting of a full hearing in past proceedings of a similar nature does not necessarily mandate that procedure here. Since proposed rules and regulations are involved here, they assert that only the opportunity to participate as allowed is required. Finally, because this proceeding, as a rulemaking, would fall under section 553 of the APA, proponents conclude that a full adjudicatory hearing is unnecessary.

Conclusion.—As indicated in the Notice of Proposed Rulemaking, this proceeding was initiated in accordance with section 553 of the APA, and consequently no oral hearing is required. Moreover, no hearing is mandatory under section 1(15) of the Act, which in itself constitutes sufficient statutory basis for Commission authority to consider the proposed rule. The procedures employed are adequate generally to develop a record upon which an informed decision may be predicated.

Under the procedures used herein, all interested parties were accorded ample notice and opportunity to comment on the matter under consideration, and to reply to the statements of other parties. The 7-month interval between the service date of the Notice of Proposed Rulemaking and the due date for initial statements, caused by the petitions for clarification, allowed ample time for parties to prepare comments.

Thus, in this posture, this proceeding is not dissimilar from *United States v. Florida East Coast R. Co.*, 410 U.S. 224 (1973), which held that the same procedures as employed here were not unlawful in a rulemaking proceeding where the establishment of incentive per diem was being considered. We conclude that the procedures used are adequate and an oral hearing is unnecessary.

We recognize that many problems were raised in the initial submissions which remain unsolved. Although we support the principles embodied in the rule, we find it nec-

essary to reopen this proceeding to secure more concrete and comprehensive data on a variety of issues. This further proceeding will obviate the difficulties and claims of prejudice suggested by the supporters of an oral hearing. However, we believe that written initial statements within 120 days of service of this report and written replies within 30 days thereafter can produce the necessary information, and can do so with the least delay and expense to the parties. After that period participants may petition the Commission for cross-examination, oral hearing, or oral argument within a 30-day period, which we will allow them for study of the record. Upon good cause shown, and in its discretion, but not as a matter of right, the Commission may grant such motions.

Arguments

All evidence and arguments not mentioned have been considered and given due weight. Discussion of many of the various examples given in support of arguments has been omitted, since its inclusion would unduly lengthen this opinion without advancing its disposition. Moreover, many such examples are of little evidentiary value because of the absence of underlying data or explanation as to methodology. Repetitions of arguments without elaboration or underlying support are omitted to the extent possible

We shall group the arguments of the parties in accordance with the three distinct interests mentioned above. After each set of arguments we will discuss briefly the major points in direct reply. It should be understood, however, that the sections containing major arguments of each of the three groups must be considered in order to determine the totality of their individual arguments.

Contentions of carrier proponents.—The carrier proponents (essentially, Burlington Northern, Inc., and Union

Pacific Railroad Company) assert that the current rules are historical remnants of the era prior to free interchange of cars and high penalty elements in demurrage charges. Burlington Northern submits that the present system does not reflect current economic considerations and does not take present recordkeeping and computerization into account.

The Denver and Rio Grande Western Railroad Company proposes that the proceeding be continued in order to develop practical accounting and policing procedures. Although this carrier expresses support for the concept of the proposed rule, it does not believe there is presently a practical accounting system which would allow for the scheme's implementation. It also fears the cost of recordkeeping might be excessive.

Union Pacific's initial statement expressed doubt that a significant incentive for acquisition of equipment would be generated by the instant proposed rule since the amounts to be remitted would probably be far less than those paid under the incentive per diem system. Union Pacific also contends that the carrier has little control over the length of time a car is held, which it believes demonstrates that the rule will not be efficacious in improving utilization. The Union Pacific relies mainly on the argument that it is inequitable for a nonowning railroad to profit at the investor's expense, though it believes that the amount of money which may change hands is small. Therefore, it urges the Commission to examine the costs of the rule since it is conceivable that administrative costs might drain off a substantial portion of the net remittances.

Burlington Northern, which supports the proposal in principle, stresses the inequity of a serving line retaining demurrage in excess of its expenses (including per diem, recordkeeping, and storage facilities) while the railroad car owner is being deprived of a return on its investment

during the detention period. Burlington Northern points to its substantial investment in cars and the fact that a substantial segment of its fleet is off line at all times. When so detained, Burlington Northern states that it is being deprived of a substantial return on equipment in which it has invested. It states that incentive to invest is stifled by the asserted penalizing of the car owner under current rules and that increased return will induce the acquisition of additional cars.

The carrier proponents state that average daily per diem, which is the amount returned to owners, is far less than demurrage receipts. They contend that the penalty element of demurrage is easily separable from the amount necessary to meet the serving carriers' expenses. Furthermore, in fairness these funds should be remitted to the investing owner who took the investment risk and might be more inclined to continue investing in freight cars if its return on investments is increased. Union Pacific also urges that there is no evidence to show the remittance proposed would be unreasonable or excessive.

The proponents argue that demurrage need not be used to offset all per diem since demurrage is not intended as a source of revenue. Reclaim allowances exist, and provisions for the costs of per diem are included in line-haul and switching rates. Burlington Northern maintains that average per diem cannot exceed $4 per car per day, thus making it reasonable to consider remittance of the penalty portion of demurrage which exceeds $10 per day, since the remainder of the $10 should cover costs.

Burlington Northern claims (as does Union Pacific in its reply) that the administrative procedures required for implementation of the remittance scheme, as well as its costs, are feasible. It contends that available data, including present car detention records, can be utilized to obtain needed information, including the identity of and amounts

due foreign owners, with minimal expense. Assertedly, only excess cars, not every car, need be accounted for. Moreover, eventual computerization of demurrage records, with resultant efficiencies, is envisioned, although it is admitted that under the present demurrage system, the disposition of excess demurrage charges from an accounting standpoint would need to be handled manually.

Burlington Northern admits that additional effort might need to be applied in connection with cars held under average agreements and that obviously, a uniform plan for handling remittance of charges collected under average agreements is essential in order to treat all car owners fairly and equally. It suggests that amounts remitted to car owners which are computed under average agreements could be handled as follows: debits and credits under average agreements could be applied to the cars involved on a first-in, first-out basis, thus affording credit for "runaround" cars. With ultimate computerization in mind, such a proposal is assertedly entirely feasible. Alternatively, excess demurrage under average agreements might be divided equitably between all cars involved in the average agreement.

Union Pacific's comments on recordkeeping are contained in its reply statement and will be discussed in the "Replies to Opponents" section.

Proponents reject arguments that no incentive to buy cars will result from the rule. Such arguments are assailed as defying common sense since the additional income to various railroads will correlate with their ability to purchase cars and will provide them some return on their investment during periods of detention.

Replies to carrier proponents.—Opponents AAR and ASLRA present detailed argument and examples purporting to show that Burlington Northern grossly miscalculated the costs and administrative feasibility involved in

remitting excess demurrage, especially for smaller roads. It is submitted that the accounts will require specific and detailed knowledge of tariffs on the part of employees involved and, in many instances, will require manual accounting. Additional costs are also anticipated for claim procedures. It is argued that the considerable expense of implementing the proposal would needlessly dissipate presently available funds.

An AAR witness familiar with both demurrage and computerization severely criticized Burlington Northern for underestimating the expense of implementing the proposal. Great effort is envisioned in order to computerize demurrage remittances and some problems may not be solvable by computer, requiring costly manual accounting.

The witness suggests that Burlington Northern's runaround adjustment on average agreement accounts ignores the technical rules currently existing concerning such adjustments, which can only be made when the carrier causes the runaround. Separate computations are required when there is no relationship between involved commodities.

In case a shipper subsequently prevails in an overcharge claim based on a runaround adjustment the collecting carrier might, according to the witness, need to seek a re-remittance of accounts paid to owners which might involve several foreign owners (and could involve further remittances to other owners involved in the adjustment).

Since demurrage is already divided in diversion and reconsignment situations (between roads which may not be the owners in some cases), further remittances to the owner, which could not be easily handled by computer, might be required by the scheme. These are among the examples given in attacking the technical feasibility and expense of the proposal.

AAR contends that per diem charges adequately compensate owners, that per diem proceedings are the proper

forums for considering car ownership costs and that incentive per diem is a more reliable tool to stimulate investment than the present proposal. It is further contended that additional payments to owners would exceed a maximum reasonable level. Moreover, since there is no assurance that the funds will be used for investment in equipment, AAR argues that the rule will not achieve its purposes. Increased expenses on arbitrary cars,[6] including costs of congestion, extra switching and handling, and storage on railroad-owned tracks, in addition to per diem expenses, are alleged to justify, in part, retention of all demurrage by the serving carrier. It is asserted that the total demurrage collected on cars during the arbitrary period often will not be enough to cover the per diem incurred during the time the car is in the possession of the shipper.

The opponents charge that the proponents' statements reveal a complete absence of support for the objectives set forth in the Notice of Proposed Rulemaking and merely constitute an attempt to gain greater revenues. AAR concludes that proponents have offered nothing to support the premise that the proposal will stimulate investment, accusing them of merely reiterating the Commission's statements in the Notice of Proposed Rulemaking.

Contentions of private car proponents.—The main contention of the private car proponents (shippers, owners, or lessees of private cars) is that remittances should also accrue to private car owners or lessees. The foodstuff lessees are willing to postpone determination as to whom remittances should be made. Swift Edible Oils Company and Swift Fresh Meats Company, divisions of Swift and Company (hereinafter called Swift) asserts that remittances should go to the lessee. The private car owners

6. Arbitrary cars are those cars which are detained beyond the time when first level demurrage accrues and upon which arbitrary (second and third) level demurrage accrues.

express concern about car shortages and inadequate railroad investment, discussing the necessity and ability of private cars to help remedy these problems. They state that increased incentive to invest in private cars will aid in solving the car supply problem.

The foodstuff interests,[7] Miller Brewing Company, The Fertilizer Institute and others submit that expansion of the car supply through the acquisition of private cars is necessary in view of railroad inaction in increasing car supply. The foodstuff interests cite an increase in private hopper cars from 6 percent of the total number of hopper cars in 1960 to 23 percent in 1970, a period during which the total number of boxcars declined, as indicative of the importance of private cars. Additionally, they and Cargill, Incorporated, argue that an expanding private car fleet frees railroad cars for other shippers' use and allows railroad money to be invested elsewhere. Swift denies that the identity of the car owner should be dispositive of whether remittance should be made. Swift believes that demurrage charges for private cars should continue to be assessed, whether accrued on railroad or private tracks.

The foodstuff interests state that car owners and lessees are damaged by detention because they receive no return on investment on idle cars since mileage allowances do not operate during detention periods. Furthermore, they represent the carriers' receipt of demurrage on private cars as being windfall earnings. Westinghouse Electric Corporation avers that no additional services are performed on days when demurrage reaches arbitrary (penalty) levels which might warrant carrier retention of the higher receipts. It charges that the present system of

7. Bay State Milling Company, General Mills, Inc., International Multifoods Corporation, Peavey Company, and The Pillsbury Company filed a joint statement. For convenience we refer to them collectively as the foodstuff interests.

profiting on foreign cars erodes the incentive to purchase an adequate number of cars. Garvey, Inc., and Georgia-Pacific Corporation, among others, assert that carriers can inequitably trade on another's investment under the current system.

Most of these proponents focus on the supposed inadequacy of the mileage allowances by which they are compensated as further justification for increased payments through demurrage remittances. The foodstuff interests indicate that their leasing expenses exceed their compensation. They stress that currently they receive no compensation for idle cars. Inadequacy of allowances and the inability of railroads to furnish special equipment are urged as grounds to allow private car participation in the proposal. Swift, and others, allege that investment incentive is curtailed by this inadequate compensation. Although various private car proponents argue that the proposal will stimulate their investment as well as that of the railroads, they do not indicate the extent to which they might invest, or why they would purchase any more cars than they immediately require.

Swift and the foodstuff interests fear that remittance of arbitrary demurrage only to railroad car owners will create an opportunity for discrimination. Placement of railroad-owned cars first in order to profit from demurrage on delayed private cars could supposedly be secretly arranged, although this would violate several statutes.

The foodstuff interests insist that the argument that total demurrage should meet total per diem charges is erroneous since there exists both an allowance for per diem expenses in line-haul and switching rates and, in certain situations, per diem reclaim allowances. They contend that the first level of demurrage provides adequate compensation to the serving railroad, as exemplified by the refusal of division 2 to increase strike demurrage from $4

to $5 in *Strike Demurrage Charge, Nationwide,* 340 I.C.C. 179 (1971). They argue that recent increases in demurrage charges have been motivated principally by a desire to encourage release of cars by increasing penalties to shippers, implying that the lower levels previously assessed adequately compensated the serving carrier for its expenses.

Swift and the foodstuff interests insist that remittances on private cars would not be a form of rebate, as some carriers maintain. They submit that currently mileage allowances are less than leasing costs. Again, they cite inadequate car supply as requiring them to provide cars, especially tank cars, upon which investments they feel entitled to a return. Remittances are depicted as indirect payments from one transportation user to another through the railroads, and consequently should not be characterized as rebates. This would be especially true since the railroad would still receive the full rate for the line-haul or switching service. These proponents declare that remittance rules of uniform application are possible. Countering another of their proponents' contentions, Swift further urges that section 15(13) of the Act does not prevent remittances on private cars.

The foodstuff interests allege that the present system, in failing to allow demurrage to accrue to the account of private car owners or lessees violates section 1(11) of the Act. Moreover, they assert that the increasing importance of private cars results in different circumstances from prior eras in which the Commission refused to allow demurrage to go to private car owners or lessees.

Champion International Corporation suggests that private car owners retain the option to trip lease in order to prevent demurrage from accruing. Allied Mills, Inc., favors remitting all demurrage on private cars, particularly if detention occurs on private tracks. The Glass Container Manufacturers Institute, Inc., would require the railroads

to earmark remitted funds for maintenance and acquisition of equipment. Otherwise, they fear such funds might be channeled into a general fund and negate the purpose of the proceeding.

The Public Utility Commissioner of Oregon supports the arguments advanced by these proponents and further contends that demurrage should be increased, a fair return on investment allowed, and subsidization of inefficient shippers (through low demurrage) ended.

We do not believe that this is the proper proceeding to deal with these issues.

Replies to private car proponents.—Burlington Northern joins with AAR and ASLRA in opposing inclusion of the private car proponents in the remittance scheme.

ASLRA anticipates even greater administrative problems and costs than estimated in its initial statement, without any countervailing benefits, if private cars are included in the remittance scheme. It contends that the adequacy of mileage allowances should be addressed in proceedings specifically dealing with such allowances.

ASLRA accuses the private car proponents of solely seeking to reduce their ownership costs without supporting the objectives of the proposal. AAR further argues that there is no assurance that remittances on private cars would be used for equipment acquisition and believes that the private car proponents would strenuously object to any earmaking requirement as applied to them.

Burlington Northern and AAR maintain that it would be a form of rebate if private car owners receive funds in excess of ownership costs. Burlington Northern characterizes remittances on private cars as possible discrimination or concessions, as well as rebates, in violation of section 15(13), as interpreted in *Allowances for Privately Owned Tank Cars*, 258 I.C.C. 371, 378 (1944).

Burlington Northern and AAR surmise that the mileage allowances by which private car owners or lessees are compensated would need to be adjusted so that they would not receive payments in excess of reasonable compensation. Burlington Northern asserts that the private car owner is only entitled to a return of ownership costs under section 15(3) of the Act. AAR further contends that the issue of the adequacy of mileage allowances is improperly raised here in that this is not a proper proceeding to review the adequacy of the private car owners' compensation (rather than in one specifically instituted under section 15(13)).

Finally, AAR asserts that if private cars are included in an excess demurrage remittance scheme, the contribution of private detention charges and their total economic consequences must be reviewed.

Contentions of opponents.—The railroads, principally represented by the AAR (except certain roads specified heretofore) and the ASLRA, oppose the proposed demurrage remittance scheme.

These railroad interests quarrel with the assumption that carriers encourage detention in order to profit from demurrage. ASLRA points out that such an assumption is inconsistent with the Commission's undertaking in Ex Parte No. 285, *Maintenance of Records Pertaining to Demurrage, Detention, and Other Related Accessorial Charges by Rail Common Carriers of Property,* wherein it was assumed that demurrage is not being collected because adequate records were not being kept. It also alleges that the instant proposal would prove counterproductive to the program proposed in that proceeding.

ASLRA believes that to require the serving line to surrender a large portion of demurrage revenue to the owning line would make still more difficult to justify, from a revenue-expense standpoint, the continued maintenance

of adequate records. AAR thinks that the assumptions herein contradict the assumption, implicit in Ex Parte No. 285, that railroads are not collecting demurrage charges. AAR and ASLRA contend that the railroads can do little to influence the economic judgment of shippers who detain cars when they perceive it to be in their best interest. They aver that shippers are more influenced by the level of demurrage charges than anything else. ASLRA states that the congestion caused by excessive detention is too costly to warrant its encouragement. Furthermore, AAR and the Western Pacific Railroad Company (Western Pacific) maintain that more revenue can be obtained by a carrier if a car, even a foreign car, is in service rather than accruing demurrage. Thus, it is argued that the carriers' best interests are served by discouraging detention.

Western Pacific asserts that better means exist to increase car utilization. Therefore, it urges the Commission not to take precipitous action in implementing this proposal, but to conduct a detailed evaluation of its reasonable anticipated *net* financial result. Opponents generally argue that car utilization will not be augmented by the proposal since detention is largely controlled by the shipper, who is not affected by the proposed rule. Western Pacific further states that car service orders effectively discourage motivation to detain rolling stock.

AAR, ASLRA, and Western Pacific further argue that implementation of the proposal will require burdensome administrative and recordkeeping costs which would dissipate available demurrage funds because additional accounting procedures and personnel will be needed if the scheme is instituted. ASLRA contends that administration would be complicated by audits and other considerations required by demurrage rules variations. AAR and ASLRA submit that many carriers would have to initiate costly

manual administrative procedures. Methods of accounting and auditing, particularly of contested bills, allegedly would be complicated and difficult.

The AAR and its witness from the Penn Central declare that administration of the rule under average agreements would be complex. The witness detailed various problems and expenses, some of which are mentioned in the "Replies to Carrier Proponents" section. He avers that some problems which would arise could not be handled by computer. Opponents foresee the necessity for accounts for each owner and the recording of every car under the proposal. Furthermore, the administrative feasibility of the proposal is questioned, particularly in regard to problems concerning diversion, reconsignment claims, tariff interpretations, runarounds, variances, exemptions, and bunching, which allegedly would be expensive and difficult to handle under this system. AAR foresees collections and the balancing of contested bills as producing particularly difficult and expensive problems. Additionally, AAR submits that the incentive for serving carriers to pursue costly collection suits for sums of demurrage of only a few hundred dollars may be lost if the small amounts recovered must be divided, especially if the serving carrier must bear the full cost of the suit.

ASLRA claims that a study of 36 representative lines shows that if the proposal were implemented, administrative costs of demurrage would increase 39.8 percent ($453,828), in addition to the one-time programming costs. AAR states that it would be costly to determine amounts which might be remitted but it believes that they would be negligible compared to the scheme's cost. Although stating that it would be difficult and expensive to determine administrative cost increases, AAR offers estimates by an eastern road of $25,000 in setup costs and $96,000 in annual expense; by a midwestern and southern road of

$90,000 in annual expense; and by the Southeastern Demurrage and Storage Bureau of $40,000 in annual costs, plus costs to its members (which are estimated to be about $40,000 in annual costs for two southeastern roads). AAR also objects to these administrative costs because there would be no corresponding production of revenues or other foreseeable benefits to offset them. It believes that an insignificant amount of funds would be shifted, at great cost, which would actually lessen industry ability to acquire equipment.

AAR contends that demurrage arises from local events having to do with business practices of the serving lines' customers, and bears no relationship to the identity of the car owner. Moreover, demurrage charges are not in the nature of reciprocal charges but are meant to encourage release of cars. Furthermore, ASLRA and AAR assert that cars held for extended periods produce increased and uncompensated expenses such as yard and terminal congestion and additional handling and switching. ASLRA contends that short lines have little control over congestion, which is both inefficient and costly to them. ASLRA presents the following table to demonstrate that efficiency is in inverse ratio to congestion. Costs of arbitrary cars were not detailed, however.

TABLE I

Volume and efficiency of representative short lines, years 1967 to 1971, inclusive

(TOTAL TONS HANDLED VERSUS TONS HANDLED PER ENGINE HOUR)

(TONS PER ENGINE HOUR = TPEH)

Period	Carrier A		Carrier B		Carrier C		Carrier D		Carrier E		Carrier F		Carrier G	
	Tons	TPEH	Tons	TPEH	Tons	TPEH	Tons	TPEH	Tons	TPEH	Tons	TPEH	Tons	TPEH
	(000)		*(000)*		*(000)*		*(000)*		*(000)*		*(000)*		*(000)*	
1967	10,481	129	14,122	119	686	437	5,946	236	2,315	172	6,617	366	17,600	141
1968	10,343	116	14,481	119	45	38	7,676	226	1,892	155	6,884	349	17,002	140
1969	10,475	133	13,966	111	651	412	7,100	229	1,633	148	6,860	392	16,807	140
1970	10,047	128	11,799	116	797	495	6,887	231	1,616	153	6,837	416	17,152	153
1971:														
Jan	762	108	964	121	62	521	619	234	158	173	529	433	1,332	144
Feb	812	121	1,050	[1]108	53	431	498	195	128	151	402	328	1,239	137
Mar	926	120	1,228	110	86	628	663	222	133	[1]140	698	461	1,418	138
Apr	869	[1]126	1,198	[1]113	66	420	684	225	106	118	591	[1]483	1,547	152
May	919	127	1,188	111	20	145	663	226	109	123	439	[1]499	1,637	158
June	865	[1]135	1,182	113	49	329	642	226	97	[1]130	557	563	1,518	158
July	726	117	1,032	[1]122	67	496	450	214	93	122	275	328	1,143	150
Aug	418	[1]150	783	121	61	[1]570	384	[1]268	99	132	556	574	374	[1]197
Sept	508	159	615	[1]141	80	[1]548	375	[1]270	96	[1]138	595	[1]553	876	[1]154
Oct	455	134	283	139	53	327	351	[1]273	103	[1]136	194	126	854	138
Nov	449	135	242	132	40	308	383	[1]246	106	147	3	39	1,167	[1]137
Dec	630	153	236	128	52	371	324	214	119	161	473	390	1,132	135
Year 1971 ..	8,339	128	9,891	117	689	419	6,136	229	1,347	139	5,312	467	14,237	147

1. Effect of congestion on efficiency.

ASLRA charges that the proposal misconceives and subverts the entire pattern of per diem and demurrage arrangements and that it constitutes a hybrid scheme which confuses the two concepts. Opponents assert that the issue of adequate compensation is raised improperly here, since more appropriate procedures to deal with it exist. Since the demurrage remittances in issue are not adjusted by the type of car, the rationale underlying the proposal supposedly cannot be compensation, according to opponents. AAR and ASLRA state that arbitrary level demurrage is a penalty and is not designed to provide compensation and produce revenue. These opponents point out past Commission refusal to consider demurrage for revenue purposes or as an offset for costs, at least not for those costs not relevant to the accrual of demurrage.

AAR characterizes the proposal as an unwarranted extension of the purpose of demurrage charges in violation of the principle that the serving railroad is entitled to demurrage because it provides the transportation service. ASLRA submits that if compensation of car owners should be increased, it should be accomplished through per diem rates, which are presumably adequate to cover car ownership costs; and if inadequate car ownership is to be remedied, it should be done through incentive per diem. ASLRA argues that additional compensation to owners in the form of demurrage remittances would result in payments above the just and reasonable maximum limits prescribed in *Incentive Per Diem Charges—1968*, 337 I.C.C. 217 (1970).

AAR and ASLRA contend that demurrage should continue to compensate the serving carrier and be used to offset per diem charges, especially given increased incentive per diem levels, which on certain cars exceed $10 per day. ASLRA claims that per diem charges exceed demur-

rage receipts generated on all cars not just foreign cars. It presents examples of the amounts of per diem which could accrue without offsetting demurrage receipts and further emphasizes increased expenses on detained cars. Therefore, it is argued that demurrage receipts do not always compensate the collecting road for per diem, much less for the other expenses associated with detained cars. The following table demonstrates this argument:

TABLE 2

Demurrage charges versus per diem responsibility per car handled for the year 1971

Railroad number	Demurrage	Per diem	Difference column B minus column C
A	B	C	D
1	$ 7.29	$11.24	$ (3.95)
2	48.53	10.72	37.81
3	3.20	1.60	1.60
4	7.19	3.53	3.66
5	0.54	1.28	(0.74)
6	2.12	4.10	(1.98)
7	3.75	5.62	(1.87)
8	5.61	4.25	1.36
9	1.87	6.26	(4.39)
10	3.93	6.70	(2.77)
11	6.23	4.74	1.49
12	4.20	3.10	1.10
13	6.74	6.11	0.63
14	0.01	3.90	(3.89)
15	1.06	2.40	(1.34)
16	1.24	1.44	(0.20)
17	0.65	2.04	(1.39)
18	1.63	2.29	(0.66)
19	0.39	2.39	(2.00)
20	0.89	0.44	0.45
21	2.30	2.90	(0.60)
22	6.90	3.59	3.31
23	2.38	3.72	(1.34)
24	0.89	3.26	(2.37)
25	3.55	2.54	1.01
26	3.71	8.37	(4.66)
27	4.46	10.42	(5.96)
28	1.55	1.55	
29	1.49	6.92	(5.43)
30	1.07	5.02	(3.95)
31	2.29	4.95	(2.66)
32	1.82	2.13	(0.31)
33	5.13	3.98	1.15
34	10.12	8.43	1.69
35	0.87	11.49	(10.62)
36	2.24	7.62	(5.38)
Weighted average	2.68	3.30	(0.62)

ASLRA asserts that a study of 36 representative lines showed that only 13 lines offset all per diem charges with demurrage revenue. The absence of underlying details, however, detracts from the evidentiary value of this study.

ASLRA also states that 3.5 percent of the gross revenue of the 36 representative lines is derived from arbitrary (above the $10 per day level) demurrage on foreign cars. It believes that loss of this revenue would not result in improved operations.

AAR declares that 80 percent of delivered cars are under average agreements. It presents examples which indicate, for instance, that a debit car may be detained from 7 to 10 days and if offset by credits earned on other cars only $20 demurrage might accrue on it for 1 day at the first arbitrary level. Under the proposal, $10 of this $20 would be remitted to the owning road although AAR contends that per diem and administrative, truck rental, and handling expenses would not be met on the car or, in some cases, all the cars involved in the agreement.

ASLRA states that 90 percent of its patrons are parties to average demurrage agreements. It avers that the car detained for the maximum period before demurrage income starts to accrue will incur substantial per diem charges for the time factor alone. In addition, the per diem on the four additional cars needed to offset the maximum car must be considered. The penalty demurrage would not exceed per diem on this cycle until the 13th day of detention on the maximum car, and not until the 21st day under the proposal. The shortest car cycle would involve 9 days per diem responsibility before demurrage began to accrue. ASLRA posits that, conservatively, the average four credit cars and four debit cars would incur $172.50 per diem charges prior to the accrual of any demurrage revenue.

AAR maintains that credits and debits under the average agreement are computed on cars without regard to their ownership. It alleges that there is no way to attribute credits and debits to specific cars when balancing

accounts. Although AAR admits being able to identify cars in the agreement, and thus their owners, it argues that carriers are unable to prorate the entire amount collected and to determine whether the amount collected on individual foreign cars met expenses due to the methods by which the agreements are administered. These problems are in addition to the administrative problems mentioned above.

The opposing carriers assert that, in any event, the proposal will not achieve its objectives because funds will be siphoned off in administrative costs rather than allocated to the acquisition of cars. ASLRA doubts the utility of the proposal for increasing car supply and utilization, in that revenues merely will be shifted among carriers and funds dissipated in administrative costs. AAR notes that every railroad will incur substantial additional costs under the proposal.

AAR argues that since the plan will produce no revenue, investment incentive will not be promoted. Although some lines might be net creditors, all would incur additional costs under the scheme. Thus, AAR and Western Pacific assert that the railroad industry's ability to acquire cars will be diminished since the costs will result in less total demurrage revenue. AAR contends that advanced investment planning will be impossible because of the uncertain nature of the receipts. AAR thus states that there is no assurance that the additional revenue would go to freight equipment purchases. It cites incentive per diem as a better tool than demurrage, more accurately projected for investment decisions, for use in encouraging adequate car supply. Western Pacific maintains that additional heavy administrative expenses will dissipate the benefits of the proposal to "creditor" lines and further compound the very factors which severely limit the ability of "debtor" lines to contribute to the car supply.

Since earmarking of demurrage receipts was rejected in *Demurrage Rules and Charges, Nationwide,* 340 I.C.C. 83, 90 (1971), and presumably would be here also as conflicting with incentive per diem earmarking, ASLRA submits that there would be no way to insure that demurrage remittances would increase car acquisitions. Also, opponents assume that private cars would be built only to the extent owners or lessees require them, regardless of amounts remitted.

The Mississippi Export Railroad Company, Savannah State Docks Railroad Company, and Detroit Terminal Railroad Company contend that the effect of the proposal would be especially harsh on small switching or terminal lines, for many of the same reasons presented above. Mississippi Export states that the $10 per day retained amount is insufficient to cover the expenses incurred on detained cars by destination carriers. Savannah State, a small switching carrier, submits that it shows a net annual loss of $60,000 and cannot afford to remit demurrage to large carriers. It asks that if the proposal is implemented that small switching lines be exempted. Detroit Terminal also objects to small lines becoming collecting agents, without compensation for additional expenses, for larger lines. Demurrage revenue is assertedly needed by these smaller lines for additional tracks, equipment, and wages directly related to handling and storing detained cars.

The trustees of two bankrupt roads, the Boston and Maine Corporation and the Lehigh Valley Railroad Company, entered separate statements in opposition to the remittance scheme, stating that the proposal would further harm their financial situation and would jeopardize their ability to continue service. They agree with many of the arguments set forth above. Boston and Maine estimates that the proposal would divert approximately $400,000 of its income annually at an annual expense in excess of

$40,000. Lehigh Valley asserts that the program could not be implemented on its current computer system. It characterizes the effect of the proposal as making the rich roads richer and the poor roads poorer.

Also opposing the rule are the United States Department of Transportation and the Commonwealth of Pennsylvania, which advance arguments similar to those of the opposing carriers. The Commonwealth of Pennsylvania points out that the bankrupt eastern railroads are large per diem debtors and that remittance of demurrage would exacerbate their financial problems. DOT fears that the proposal may force disruptive rate and division adjustments as well as substantial administrative costs without countervailing benefits.

Replies to opponents.—Burlington Northern declares again in reply that the demurrage rules rest solely on historical bases, ignoring economic considerations. It states the issue in terms of who should receive the penalty portion, which is presently the substantial element of demurrage. Burlington Northern believes average per diem approximates $4 per day, which it believes indicates that the retention of $10 per day would be adequate (it is unclear whether this figure includes incentive per diem or the effect of average agreements). It further submits that the $10 figure may be subject to adjustment if it can be shown to be inadequate. Along with Union Pacific, Burlington Northern believes that considerations of equity demand that investing carriers receive this portion of demurrage. Proponents regard some return on investment (rather than none while cars are idle on another line) as necessarily providing investment incentive. Proponents stress that the investor is denied return on investment while a car is unduly detained off line.

Burlington Northern, Union Pacific, and the foodstuff interests accuse opponents of not considering line-haul and

switching rate allowances for per diem or per diem reclaim allowances in presenting their position. Thus, given these other allowances, they maintain that there is no need for total demurrage to offset total per diem. The foodstuff interests aver that the proponents' arguments do not allow for other methods of per diem offset nor allow for railroad inefficiencies in calculating the per diem and expenses to be offset by demurrage.

Both Burlington Northern and Union Pacific defend the administrative feasibility of the proposal. Burlington Northern is convinced that its solutions as to average agreements are workable. It submits that present demurrage records, which it and Union Pacific believe can be computerized, contain the data necessary to implement the proposal which would only be an adjunct to the existing record maintenance and reporting system. Union Pacific contends that demurrage can presently be attributed to individual cars. The only new process it envisions is separation and accumulation of data. Records allegedly will be required only for excess foreign cars. Union Pacific characterizes the opponents' arguments concerning problems of administrative feasibility as exaggerated.

Burlington Northern, Union Pacific, and the foodstuff interests argue that opponents' studies (tables 1 and 2) are invalid since they do not distinguish line-haul and switching roads or take into account per diem reclaim allowances or line-haul or switching revenues. Burlington Northern and Union Pacific contend that the AAR and ASLRA examples are misleading and atypical, but even if not, merely show the failure of average agreements, not any lack of merit in the instant proposal. They contend that average or normal costs, including per diem charges, are not stated by opponents and must be less than their examples would indicate. Burlington Northern further accuses ASLRA of relying heavily on demurrage for revenue, contrary to the

purpose of demurrage. Furthermore, it states that short lines have per diem relief provisions available to account for their special situation. Burlington Northern notes that payee roads will still have remittances returned to them to the extent of their investment in cars.

Swift and the foodstuff interests again assert that private car owners or lessees should also receive remittances. They state that since they take the investment risk, retention of demurrage by carriers is a windfall to the carriers. Consequently, considerations of equity demand that remittance be made to the private car owners or lessees. Moreover, they further deny that such remittances would constitute a rebate, especially since the carrier will still receive the full rate for the transportation, even if the shipper's expense is reduced. They characterize the railroad as merely an agent for transfers of revenue between industries and not as paying a rebate. The foodstuff interests further contend that since private cars accrue no compensation or per diem while idle, and because their mileage allowances inadequately compensate them, per diem is not the proper vehicle to increase compensation to car owners. Finally, they argue that *Private cars, In Re,* 50 I.C.C. 652 (1918), is no longer authority to deny demurrage to private car owners because of changed circumstances including today's pressing need to encourage car building.

Discussion and Conclusions

In order for us to adopt the proposed rule under which all demurrage receipts in excess of $10 per car per day would be remitted by the delivering carrier to the freight car owner, we must be satisfied that the proposal will achieve its intended purposes of increasing car utilization or car supply. As a necessary corollary we must determine whether the proposal is administratively feasible and whether the expense of the program outweighs any

benefits which might be derived from its implementation. The participation of proponents of the rule advocating the extension of its application to private car owners (or lessees) necessarily presents the issue of whether these parties should be allowed to participate in the remittance scheme. We will discuss the issues in the order of car utilization, private car participation, car supply, and administrative feasibility and cost. Because of lack of sufficient data on the final point, we reopen the proceeding for further hearing.

Car utilization.—The shipper to whom the carrier delivers a car pays the demurrage. He has control of the car and determines how long he will hold it. One of the factors he will consider in deciding how long to detain a car is the amount of the demurrage charges.

This proposal does not alter the level of demurrage charges. It merely shifts the payment of part of these charges from one group, the receiving carrier, to another, the car owner. Since it can make no difference to the shipper whether he pays the charge to one party rather than another, it may appear that the implementation of this proposal would have no impact on car utilization.

However, evidence collected by the Commission staff in another proceeding suggests that this proposal may have a positive impact on car utilization. The Commission has issued a Notice of Proposed Rulemaking and Order in Ex Parte No. 285, *Maintenance of Records Pertaining to Demurrage, Detention, and Other Related Accessorial Charges by Rail Common Carriers of Property.* In that notice and order, served August 16, 1972, we indicated that inquiries by the Commission's field staff revealed that large sums of money resulting from demurrage charges remained uncollected by the carriers or that such debts were canceled because carriers did not maintain adequate records. Other indications that carriers do not always collect de-

murrage charges appear in *Demurrage Rules and Charges, Nationwide,* 340 I.C.C. 83, 92 (1971), and *Incentive Per Diem Charges—1968,* 337 I.C.C. 217, 233 (1970).

When carriers do not actually collect demurrage charges, an important economic incentive for shippers to release cars with dispatch is lost. Under the proposal herein, the car owner would receive part of those demurrage payments. Faced with the necessity of paying these sums to the car owner, the delivering carrier would have added motivation to pursue the charges against the shippers and receivers. The incentive to release cars would be greater and some improvement in car utilization could reasonably be expected.

Private cars.—Before addressing the issue as to whether the proposal will increase car ownership, we will deal with the arguments of the parties who not only advocate adoption of the proposed rule, but also its extension to include private car owners or lessees.

Private cars recently have become an increasingly important component of the national freight car fleet. Although such cars realistically cannot be expected to solve the freight car shortage, they can make a contribution to its solution. There are obvious economic and practical limitations on the number of cars in which private owners will invest under any circumstances and all shipper owners of private equipment rely on railroad-owned cars to meet some of their transportation needs. Moreover, the use of and the necessity for private cars cannot relieve carriers of their responsibility to provide equipment. However, the private car owner should not be discouraged from investing in freight cars. Rather, any stimulus to increasing the national car fleet should be encouraged, especially if this can be accomplished without diminishing total car investment or other services in other sectors of the railroad system.

Transportation conditions have changed since the World War I era decisions on private cars. The private car fleet is no longer a relatively minor appendage to the system, and this fact should be recognized. Settled rules and proven methods of dealing with problems should not be discarded lightly, especially when they have proven dependable and are relied upon. But this Commission is an administrative and quasi-legislative agency (as well as a quasi-judicial agency), dealing with dynamic industries and changing economic and transportation conditions. We have a responsibility to change precedents made obsolete by decades of change and which are no longer suited to meet transportation problems. Facts must clearly support these dissimilarities or changes. When they do we should make the most appropriate decision under the circumstances to effectively interpret and effectuate the national transportation policy. In recognizing the need for flexible regulation and for avoiding overjudicialization of our functions, we will encourage innovation and necessary change as well as that degree of required stability which will best serve the needs of carriers, shippers, and consumers.[8]

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8. The United States Supreme Court stated in *American Trucking v. A.T. & S.F. R. Co.*, 387 U.S. 397, 416 (1967):

> ° ° ° in any event, we agree that the Commission, faced with new developments or in light of reconsideration of the relevant facts, and its mandate, may alter its past interpretation and overturn past administrative rulings and practice. Compare *SEC v. Chenery Corp.*, 332 U.S. 194 (1947); *FCC v. WOKO*, 329 U.S. 223 (1946). In fact, although we make no judgment as to the policy aspects of the Commission's action, this kind of flexibility and adaptability to changing needs and patterns of transportation is an essential part of the office of a regulatory agency. Regulatory agencies do not establish rules of conduct to last forever; they are supposed, within the limits of the law and of fair and prudent administration, to adapt their rules and practices to the Nation's needs in a volatile, changing economy. They are neither required nor supposed to regulate the present and the future within the limits of yesterday.

In *Distribution of Privately Owned Freight Car,* 346 I.C.C. 278, 288 (1974), the Commission recognized that: "Generally, we can assume that a shipper will have little incentive to acquire, or maintain investment in, private cars unless he is compelled to do so by car shortages or he feels that it will be profitable." In adopting any rule designed to encourage investment, we do not perceive how we equitably could exclude a recognized, large segment of investors and deprive them of some of the needed incentive to invest. This is true particularly when a primary rationale for such a rule must be that fairness and general economic principles dictate that an investor receive the return on his own investment and the incentive to invest in the future.

Moreover, we do not believe that there are persuasive countervailing factors which should exclude private car owners from participation in this program. The scheme will provide that the delivering carrier's expenses, including the costs of administering the remittance system, will be covered by the retained amount. Since the delivering carrier will not be harmed, it is proper that the investor, no matter who it may be, receive the additional return on investment, and thereby the additional investment incentive, generated by excess demurrage (albeit that demurrage is not intended as a source of revenue; the means for effectuating the purposes of high demurrage charges necessarily result in the production of revenue).

The considerations of fairness and economic principles involved in allowing return to go to the investor are not overcome by the fact that private car owners are compensated by mileage allowances since these allowances are intended to do no more than return the investors' costs. These same considerations allow private car participation in this proposal despite the existence of private detention charge arrangements. Moreover, we do not believe that

participation of private car interests will result in rebates inasmuch as the delivering carrier will receive its full rate and full compensation for all demurrage expenses in all cases.

In treating private car owners equally with railroad car owners in this proceeding, we merely recognize the absence of prejudice to the railroad system, the fairness of equal investor participation, and the importance of private cars in preserving and enlarging the national car fleet. Private car participation in a plan resulting in greater investment incentives should provide a stimulus to the maintenance and expansion of freight car investment even though some current funds are diverted from the railroad industry. Thus, it can be expected, under general economic principles, that continued additions to the existing transportation resources of the country will be encouraged by private car participation and that the general public will benefit thereby.

There is no evidence upon which to decide definitely to whom the remittance should be paid. In the absence of such evidence, we do not see how it could be paid to anyone except the rate-payer, who undoubtedly will be the lessee.

Car supply.—Although the problem of the inadequacy of car supply may be temporarily abated during certain periods of time, its chronic and recurring nature is too familiar to require elaboration. For a variety of reasons in recent years the car ownership and supply problem has been especially acute. Recognizing its responsibility to find remedies for this problem, the Commission has taken action in a number of areas.

In Ex Parte No. 241, *Investigation of Adequacy of Freight Car Ownership*, 346 I.C.C. 497 (1974), we ordered certain class I railroads to show cause why they should not be required to purchase additional equipment. Fur-

thermore, in the orders in Ex Parte No. 305, *Nationwide Increase of Ten Percent in Freight Rates and Charges,* served June 4, 1974, and thereafter, we allowed a proposed general rate increase to go into effect only on certain conditions, including use of revenues generated by the increase for capital improvements, deferred maintenance, and certain other specified purposes. By order served February 22, 1974, we extended the incentive per diem charges instituted in Ex Parte No. 252 (Sub-No. 1), *Incentive Per Diem Charges—1968,* to year-round application. Our continuing interest in remedying the car supply problem is exemplified by a recent initial decision in Ex Parte No. 252 (Sub-No. 1), served July 23, 1974, suggesting changes in the incentive per diem regulations. Moreover, we have approved innovations such as unit-train rates, annual volume rates and changes in transit and inspection rates and practices as well as issuing car service orders whenever needed. These actions demonstrate that we will not hesitate to take any reasonably proper and necessary actions to increase the car supply and to improve car utilization.

The variety of Commission action in the area of car supply cannot allow us to refrain from further actions as long as the problem remains unresolved. It must also be recognized, in accordance with the principles discussed earlier, that we will modify or even rescind actions that demonstrably no longer effectively serve their intended purposes. Thus, it is without fear of irreversible consequences that we may experiment with innovations of substantially apparent merit.

Opponents of the proposal have not refuted the principle that fundamental concepts of equity and fairness logically require that the investor receive any return on investment generated by demurrage charges above the serving carriers' total demurrage expenses. It is the car owner who suffers most and who should receive compensa-

tion when its equipment is used for warehousing. Moreover, there is no indication that greater return on investment will not be a stimulus to investment for carriers and private car owners alike, in accordance with generally accepted economic principles. This is true especially since owners will perceive demurrage remittances (and amounts set off due to current car ownership) as direct return from their investment in freight cars. We thus anticipate that this proposal will result in additional motivation and inducement for freight car investment.

As discussed earlier, antiquated precedents both in the industry, and in its regulation, cannot be allowed to impede modern, efficient, and economical development of transportation in accordance with the national transportation policy. Experimentation which appears likely to yield benefits should be encouraged. If the experiment fails, return to the *status quo ante* should not be prohibited. If a rule or practice outlives its usefulness, change should not be hindered. Even within a stable and prosperous system, latitude for growth, improvement, and innovation must be allowed .

Much of our discussion as to the reasons for allowing private car participation in the proposal is equally applicable when considering the merits of the proposal itself.

As we have noted, recurring car shortages requires us to use all avaliable means under the Interstate Commerce Act to secure the provision of adequate rail transportation facilities. No effort reasonably calculated to achieve this goal can be spared. Since we have determined the existence of our jurisdiction earlier in this report, and since we have determined that equity favors the proposal, and that it is likely to be beneficial to the railroad system, we adopt the proposal, as extended to the private car fleet, in principle.

The next section deals with the reasons why we cannot adopt and implement the proposal as promulgated immediately, and why we must reopen the proceeding.

At this point, we note that we are not persuaded by requests filed for exemption from the scheme. Short-line and terminal railroads appear to be adequately protected by per diem reclaim. If this proposal proves successful, if finally implemented, and the reclaim does not satisfy these carrier objections, an adjustment in the reclaim allowances (or perhaps even in this proposal) may prove to be proper. We believe that all carriers have an interest in a strong national car fleet and can contribute to this program as long as their total expenses on detained cars are provided for.

Feasibility and implementation; reopened proceeding.—Even considering the degree of flexibility and innovation which we rightfully must maintain, we also must not succumb to the danger of applying generally valid principles which are inapplicable in particular situations, or establishing programs which though meritorious in principle, are unworkable in practice. In this proceeding, although we believe that the principles underlying the proposal are sound, the record leaves us no choice but to reopen the proceeding for further evidence on a number of unanswered questions raised in the initial statements.

The evidence and contentions of the participants have been set out in great detail in order to draw attention to the various problem areas developed therein. The record discloses that the opponents do not present persuasive arguments against the merits or underlying principles of the proposal. Rather, their criticism is mainly directly toward the administrative feasibility and costs of the proposal (especially as compared to its benefits). These problems require resolution in a reopened proceeding before we may implement the proposal.

Although the statement of facts discloses areas of inquiry, we will now focus on those areas which we urge the participants to produce evidence and arguments to enable us to make an informed and reasoned judgment on the further disposition of this proceeding. We will outline the broad areas and general questions to be addressed. Although specific questions appear in appendix A which participants may use as a detailed guide to assist them in their preparation of further statements, rigid adherence to that format is not necessarily required.

Participants have questioned whether the amount of arbitrary demurrage which would be involved under the proposed rule warrants the cost and effort involved in its institution. To enable us to properly determine the effects of the proposal, participants should produce specific evidence as to total arbitrary demurrage revenue for a representative period, the amount which would accrue on foreign cars, and the identity of the carriers and private car owners to which these amounts would be remitted. This information will assist us in determining the net amounts involved in the program and the identity of the payors and payees. We will also be able to weigh this data against other factors raised in the proceeding.

The year 1973 is suggested as a uniform study period. Where this period is considered too lengthy for some participants they may wish to limit their presentation to the last 6 months of 1973. In the alternative, especially if past records are unavailable, participants may conduct a 90-day representative study during the 120-day period allowed for initial statements.

An important issue raised in the initial statements is the administrative feasibility of the proposal (at this point, aside from the costs). Participants are urged to submit specific information concerning the accounting and record-keeping procedures and additional personnel required for

implementation of the proposal. Opponents as well as proponents should be specific and detailed in their objections or criticisms.

Participants should inform us in detail of the nature of existing demurrage records, the modifications and additions necessary, in order to operate this program, and the number of additional personnel which will be needed should be specified. Comments on the feasibility of computerization and the extent to which carriers can participate in computerization may be presented. In discussing administrative procedures, participants should take into account the various problems raised in the statement of facts including the problems of attribution of ownership and balancing of accounts under average agreements. Other problems which appear to deserve comment include, but need not be limited to, possible difficulties in connection with demurrage rule variations, exemptions, audits, and the handling of contested bills.

Opponents have expressed further concern that the proposal will impose burdensome administrative costs on the carriers, particularly in connection with the administration of average agreements. Specific information should be adduced concerning the costs of additional procedures and personnel which will be required by this program, considering the inclusion of the private car participants. Attention should be given to both startup costs and the continuing costs of implementation. We believe that the owning roads should bear the additional costs of the program through the mechanism of a portion of the retained amount, and it appears that the proposed $10 figure would adequately cover these costs.

The amount retained by the serving carriers, in fairness, should be sufficient to cover all expenses incident to demurrage and to the administration of this proposal. We assume that the first level of charges, currently $10 per day,

will result in adequate retained revenue. Participants are invited to show that total costs would not be covered by this amount. They may take into account per diem charges (the average of which is still apparently less than $5 per day), costs of administration and collection of demurrage, the additional costs of this program, and any verifiable average costs per day for additional handling and congestion associated with arbitrary cars. Reliable figures must be produced in order to overcome the presumption that these amounts are taken on a per car basis and that the $10 figure is adequate. Allowance for any of these factors in line-haul or switching rates or per diem reclaim should be considered.

The effect of average agreements on these costs (especially in relation to the sufficiency of retained revenue) may be presented. If models or examples are used, their representative nature should be specified. Dollar amounts involved are preferable, however, and the figures presented should give a clear indication of the amount to which the $10 figure must be increased so that the average amount retained will equal the average cost per day. Stated differently, total revenue from retained demurrage should equal the total costs incurred by reason of demurrage.

The questions in appendix A focus more sharply on the matters raised in the preceding paragraphs. These questions are not meant to be exclusive and do not suggest any required format. They are merely a further guide to the parties to help them formulate the information and arguments necessary to resolve the unsettled issues in this proceeding.

(Participants are not precluded from concisely reiterating relevant examples, evidence, or argument from the initial presentations. However, they are cautioned that many of these examples lack clarity or indications of their

representative nature and should be modified (or updated), accordingly, if presented again.) Furthermore, the issues of jurisdiction and procedure have been settled and should not be reargued. (Participants also are not precluded from presenting other facts and arguments which they believe will aid in the Commission's final determination in this proceeding but the major emphasis of their statements and replies should concern the issues raised above.)

As noted in the earlier section of this report entitled "Hearing," participants will be allowed 120 days from the service date of this order to file initial statements. We believe that this period will provide ample time to gather the necessary data, or to conduct 90-day studies if desirable, and to formulate arguments. Leave to intervene will be granted liberally during this period. Reply statements will be due 30 days from the due date for initial statements. Any further petitions or motions should be filed within 30 days thereafter.

We encourage participants (and any interested parties) to produce the requested information with specificity and detail in order to assist the Commission in determining the ultimate course of this proceeding. If the proposal is implemented, we anticipate leaving the proceeding open so that we might test its effects in the light of actual experience after a reasonable period of time.

Findings

We find that the Commission has jurisdiction under its car service powers to consider the proposed demurrage remittance rule and that the hearing procedures used in this rulemaking proceeding were adequate and not unlawful.

We further find that implementation of the proposed rule may have a positive effect on car utilization.

We further find that the proposed rule is sound, equitable, and should provide incentive to invest in freight cars, and that its principle should be adopted, subject to the taking of more evidence in this proceeding.

We further find that private car owners or lessees should participate in the proposed program on an equal basis with carrier car owners.

We further find that this proceeding should be reopened for the receipt of further evidence and arguments, especially relating to the amounts involved under the proposed rule and the administrative procedures and costs of the program.

And we further find that this is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

COMMISSIONER MURPHY, concurring in part:

While I am in agreement with the majority insofar as it finds that the proposal is warranted in principle, I am unable to agree with several aspects of the majority's decision.

Turning first to the proposal to include private car owners, I am in agreement that since the matter of their inclusion was not initially brought to the notice of interested persons that a further processing at this point without adequate notice could be fatally defective. Nevertheless, I believe that if the private car owners are to be embraced within the provisions of the proposed rule, then that matter could be handled more expeditiously in a separate subnumbered proceeding. In connection with the inclusion of private car owners, one of the principal areas which must be explored before the rule is extended to those persons relates to possible violations of the Interstate Commerce Act and Related and Supplementary Acts, par-

ticularly with respect to unlawful rebating among other matters.

Turning next to the proposed processing of this proceeding, I believe it would be preferable if the proposal were implemented at this time without any additional protracted delay. Nevertheless, since a majority has chosen to secure additional data under modified procedure, I would suggest that the parties heed the admonition contained in the interim report in submitting further data herein. In that light, the parties should attempt to follow the guidelines set forth in Rule 49 of the Commission's General Rules of Practice, 49 CFR 1100.49.

COMMISSIONER MACFARLAND, dissenting:

I cannot agree wtih the majority opinion in this interim report. The proposal fails to induce more efficient freight car utilization. There is no evidence to demonstrate that the excess demurrage charges going to the owning railroads or private car owners would be used to purchase additional rolling stock. More appropriate methods are available to induce further investment in freight cars such as increasing per diem, incentive per diem, and mileage allowances. Furthermore, the practical effect of adoption of the proposed rule will be to further deteriorate the financial condition of the bankrupt eastern railroads.

COMMISSIONER CORBER did not participate.

It is ordered, That this proceeding be reopened for the receipt of further evidence and argument in accordance with the views expressed in this interim report.

It is further ordered, That initial statements shall be due 120 days from the date of service of this interim report and that reply statements shall be due 30 days thereafter.

Any further motions or petitions should be filed within 30 days thereafter.

By the Commission.

ROBERT L. OSWALD,
Secretary.

(SEAL)

APPENDIX

Question to be used as guidelines for participants in the further presentation of evidence in this proceeding.

1. Under the proposed plan, what would be the amount of demurrage payable to:
   a. Each foreign railroad on whose cars demurrage was collected?
   b. Private car owners on whose cars demurrage was collected?
2. What is the total amount of demurrage received for:
   a. Home cars in:
      1. Amounts of $10 per demurrage day or less?
      2. Amounts in excess of $10 per demurrage day?
   b. Foreign cars (broken down by individual road) in:
      1. Amounts of $10 per demurrage day or less?
      2. Amounts in excess of $10 per demurrage day?
   c. Private cars (broken down by individual owner) in:
      1. Amounts of $10 per demurrage day or less?
      2. Amounts in excess of $10 per demurrage day?
3. What are the total demurrage days on line for:
   a. Home cars:
      1. Amounts of $10 per demurrage day or less?
      2. Amounts in excess of $10 per demurrage day?
   b. Foreign cars by individual road:
      1. Amounts of $10 per demurrage day or less?
      2. Amounts in excess of $10 per demurrage day?
   c. Private line cars by individual owner:

1. Amounts of $10 per demurrage day or less?
2. Amounts in excess of $10 per demurrage day?

The demurrage days in questions 3a, 3b, and 3c must correspond to the demurrage amounts in questions 2a, 2b, and 2c, respectively.

4. What is the average amount per day paid by railroads to car owners for the time portion of car hire payable to each foreign railroad and each private car owner whose cars are used on line?
5. What records are now maintained to handle demurrage?
6. Copies of these records would be desirable.
7. What additional records would be required?
8. What existing records could be used with modifications in implementing the proposed plan?
9. Copies of the modified records would also be desirable.
10. What sepecific recordkeeping problems would be caused by average agreements?
11. What specific solutions do you propose for the handling of the average agreement problem?
12. How much additional startup expense would be involved to implement the proposed rule?
13. Separate these costs by ICC Account and indicate the number of employees which would be required.
14. How much additional expense would be incurred to administer the proposed rule on an annual basis once it became operational?

15. Separate these costs by ICC Account and indicate the number of additional employees which would be required.

    Comments on the following questions, which were raised tangentially by a few participants, are not precluded.

16. Should the demurrage in excess of $10 be earmarked for building or rebuilding freight cars?

17. What controls, if any, should be exercised over the use of these funds?

18. Should minimums or standards be adopted to insure that the funds are used for additional cars only?

19. What controls, if any, should be applied to funds generated from privately owned cars?

Served April 7, 1977

INTERSTATE COMMERCE COMMISSION

EX PARTE NO. 289

REMITTANCE OF DEMURRAGE CHARGES BY COMMON CARRIERS OF PROPERTY BY RAIL

Decided March 18, 1977

Upon investigation, proposed regulation requiring remittance to the freight car owner by a nonowning railroad, on whose lines a car is being detained under demurrage, of all demurrage charges collected in excess of $10 per car per day, modified in certain respects, and adopted. Appropriate order entered.

Curtis H. Berg, W. Donald Boe, Jr., and *William R. Power* for carrier proponents.

C. W. Bath, Oliver Callson, T. A. Ellaby, James F. Fox, H. Richard George, James J. Irlandi, James E. Isbell, Jr., A. E. Leitherer, J. W. McDermond, Thomas F. McFarland, Jr., Robert P. Post, Jon R. Roy, Larry G. Smethers, Harold E. Spencer, A. T. Walter, and *George William Wright* for private car owner or lessee proponents.

Robert C. Blinn, Emried D. Cole, Jr., Donald E. Cross, Robert S. Davis, Samuel P. Delisi, Thomas C. Dorsey, Louis T. Duerinck, Richard S. M. Emrich III, James L. Howe, III, Peter J. Hunter, Jr., Harvey Huston, C. H. Johns, Howard D. Koontz, Albert W. Laisy, Richard D. Lalane, Patrick McEligot, Richard J. Murphy, Joseph J. Nagle, R. R. Pumphrey, T. J. Siegel, John McDonald Smith, T. M. von Sprecken, Jr., R. H. Stahlheber, Sidney Weinberg, and *Kinga M. LaChapelle* for carrier opponents.

Barry Chasnoff, John Hart Ely, and *William A. Kutzke* for United States Department of Transportation, opponent.

REPORT AND ORDER OF THE COMMISSION ON FURTHER HEARING

O'NEAL, *Commissioner:*

This proceeding was instituted by notice of proposed rulemaking and order of October 12, 1972. (Notice was published in the Federal Register on October 26, 1972, Vol. 37, p. 22884.) Therein, adoption of a proposed rule was set forth for consideration. The proposed rule would require that: "The non-owning railroad on whose line a car is being detained under demurrage, shall remit to the railroad car owner all demurrage charges collected in excess of $10 per day." All common carriers of property by railroad subject to the Interstate Commerce Act (the act) were made respondents. They along with all other interested parties were invited to submit written statements of facts and arguments. In response to these representations an interim report of the Commission (349 I.C.C. 411), entered March 28, 1975, and served April 25, 1975, was issued. In the interim report, certain procedural matters were initially resolved. We held that the Commission had jurisdiction to allocate demurrage revenues under sections 1(11), 1(14)(a), and 1(15), and that no oral hearing was required in this proceeding. Also, in discussing the merits of the proposed rule, we concluded in the interim report that its adoption was warranted in principle. Car utilization would be improved and the greater return on the car owner's investment, which would result from our adoption of the proposed rule, would increase the incentive to invest in freight cars and thereby improve car supply. We also determined that private car owner participation in the rule was also supported by these same principles of car utilization and supply. However, because of the lack of evidence on the cost and administrative aspects of the rule,

the proceeding was reopened for the receipt of further evidence on its feasibility and implementation. Participants were asked to submit specific information concerning present demurrage records and the modification and additional expenses which would be incurred by the implementation of the proposed rule. Nineteen guideline questions were provided to aid participants in the presentation of the requested material. The notice of amended rulemaking proceeding was published in the Federal Register, April 30, 1975 (Vol. 40, No. 84, p. 18797).

One hundred and eighteen parties including 101 rail carriers or carrier organizations submitted evidence on the merits, feasibility, and implementation of the rule. Twenty-six [1] initial and thirteen reply statements were filed. Most carriers submitted their information through the Association of American Railroads or the American Short Line Railroad Association. A few other parties consolidated their views.

As in the interim report, we will group participants according to their major viewpoints. They are (1) carrier proponents,[2] (2) private car proponents,[3] and (3) op-

1. Petitions for leave to intervene filed by Duval Sales Corporation, Evans Products Company, and International Minerals and Chemical Corporation jointly, and Pullman Transport Leasing Company separately, were granted by orders entered September 24, 1975. The petition for leave to intervene filed by FMC Corporation was granted by order entered November 28, 1975. By order entered August 10, 1976, the initial statements of the Delaware and Hudson Railway Co. (D&H) and the Detroit Terminal Railroad Company were striken for failure to serve a copy of these statements on all parties of record. D&H's statement was subsequently admitted by order entered March 11, 1977.

2. Burlington Northern, Inc., and Union Pacific Railroad Company.

3. Archer Daniels Midland Company; Allied Mills, Inc.; Bay State Milling Company; Cargill, Incorporated; Duval Sales Corporation; Evans Products Company; FMC Corporation; Garvey, Inc.; General American Transportation Company; General Mills; Hercules, Incorporated; International Minerals and Chemical Cor-

ponents who consist mainly of carrier and carrier organizations.[4]

All evidence and arguments not mentioned have been considered and given due weight. Discussion of many of the various examples given in support of argument has been omitted since its inclusion would unduly lengthen this report. Similar arguments of the various participants will be discussed together to simplify discussion of the various positions.

Before discussing the merits, costs and feasibility of the implementation of the proposed rule, we will consider what effect, if any, the amendment of section 1(6) of the Interstate Commerce Act by the Railroad Revitalization and Regulatory Reform Act of 1976 (4RA) has on the Commission's jurisdiction in this proceeding. Except for the jurisdictional issue, we will set out our discussion and conclusions of the participants' contentions after the presentation of all the arguments and evidence.

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3. (Cont'd.)
poration; International Multifoods Corporation; Peavey Company; The Pillsbury Company; Pullman Transport Leasing Company; and Swift Edible Oil Company and Swift Fresh Meats Company—Division of Swift and Company.

4. American Short Line Railroad Association; Association of American Railroads; Robert W. Meserve and Benjamin H. Lacy, Trustees of Property of Boston and Maine Corporation, Debtor; Cedar Rapids and Iowa City Railway Company; Chicago, Milwaukee, St. Paul and Pacific Railroad Company; Elgin, Joilet and Eastern Railway Company; Florida East Coast Railway Company; Illinois Central Gulf Railroad Company; Robert C. Haldeman, Trustee of Property of Lehigh Valley Railroad Company; Louisville and Nashville Railroad Company; Mississippi Export Railroad Company; Norfolk and Western Railway Company; Robert W. Blanchette, Richard C. Bond, John H. McArthur, Trustees of Property of Penn Central Transportation Company, Debtor (now a part of ConRail); and Delaware and Hudson Railway Company.

JURISDICTION.

Jurisdiction.—Section 1(6) was amended by the 4RA as follows:

> Demurrage charges shall be computed, and rules and regulations relating to such charges shall be established, in such a manner as to fulfill the national needs with respect to (a) freight car utilization and distribution, and (b) maintenance of an adequate freight car supply available for transportation of property.

By order dated February 27, 1976, the Commission noted that the amendment of section 1(6) appeared consistent with the announced purposes of this proceeding, and solicited comments on the effect of the amendment. Eighteen statements in response were submitted.[5]

The parties principally discuss whether the recent amendment conferred, confirmed, or refuted the Commission's jurisdiction to establish the proposed rules. Carrier opponents generally argue that the Commission did not have jurisdiction before section 1(6) was amended and that jurisdiction was not conferred by the recent amendment. Counter arguments by carrier and private car owner proponents, however, state that the amendment

5. American Short Line Railroad Association; Archer Daniels Midland Company; Association of American Railroads; Bay State Milling Company; Burlington Northern, Inc.; Cedar Rapids and Iowa City Railway Company; Duval Sales Corporation; Evans Products Company; Exxon Company, U.S.A.; Farmland Industries, Inc.; Florida East Coast Railway Company; FMC Corporation; General Mills; Grain Divisions/Cook Industries; International Minerals and Chemical Corporation; International Multifoods Corporation; Mississippi Export Railroad Company; Missouri Pacific Railroad Company; Peavey Company; Penn Central Transportation Company; The Pillsbury Company; Pullman Transport Leasing Company; U.S. Department of Transportation; and the Union Pacific Railroad Company.

confirms the Commission's authority to promulgate the proposed rule.

Carrier opponents.—Opponents to the rule argue that the stated purposes of the amendment are defeated by the proposed remittance scheme, which is said to be governed by principles of equity, not of car utilization and distribution, or of an adequate supply. They argue that no evidence has been presented to establish that the proposal will cause car owners to purchase additional, or shippers to release equipment expeditiously. In fact, the rule is argued to have the opposite effect since nonowning carriers will have less motivation to collect demurrage charges for the reason that they will be remitting the excess amount to car owners; and shippers detaining their own equipment, it is further argued, will have less incentive to release cars quickly because demurrage in excess of $10 will be remitted to them. (Further elaboration of these points will be given in the discussion of car utilization infra.) It is also contended that since the amendment merely authorizes the Commission to regulate the "level" of demurrage charges, it does not confer power to divide the charges—as is being done in this proceeding.

Still another argument is that the Commission is trying to combine unlawfully the two powers conferred by the amendments to sections 1(6) and 1(14)(a) of the act: the power to compensate an owner for the use of its cars and the power to regulate the use of cars.[6] Section 1(14)(a)

6. Sec. 1(14)(a):

(14)(a) It is the intent of the Congress to encourage the purchase, acquisition, and efficient utilization of freight cars. In order to carry out such intent, the Commission may, upon complaint of an interested party or upon its own initiative without complaint, and after notice and an opportunity for a hearing, establish reasonable rules, regulations, and practices with respect to car service by common carriers by railroad subject to this part, including (i) the compensation to be paid for

of the act was amended to encourage the purchase, acquisition, and efficient utilization of freight cars. In establishing rules and regulations (after oral hearing) for the compensation to be paid a car owner, the Commission was directed to consider whether there is just and reasonable compensation to the owner, and whether it will contribute to sound car practices and encourage the acquisition and maintenance of car supply. This, it is argued, has not been done in this proceeding. Therefore, the Commission has no jurisdiction under section 1(14)(a), and cannot combine this section's compensatory element with the demurrage provisions of section 1(6).

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6. (Cont'd.)
the use of any locomotive, freight car, or other vehicle, (ii) the other terms of any contract, agreement, or arrangement for the use of any locomotive or other vehicle not owned by the carrier by which it is used (and whether or not owned by another carrier, shipper, or third party), and (iii) the penalties or other sanctions for nonobservance of such rules, regulations, or practices. In determining the rates of compensation to be paid for each type of freight car, the Commission shall give consideration to the transportation use of each type of freight car, to the national level of ownership of each such type of freight car, and to other factors affecting the adequacy of the national freight car supply. Such compensation shall be fixed on the basis of the elements of ownership expense involved in owning and maintaining each such type of freight car, including a fair return on the cost of such type of freight car (giving due consideration to current costs of capital, repairs, materials, parts, and labor). Such compensation may be increased by any incentive element which will, in the judgment of the Commission, provide just and reasonable compensation to freight car owners, contribute to sound car service practices (including efficient utilization and distribution of cars), and encourage the acquisition and maintenance of a car supply adequate to meet the needs of commerce and the national defense. The Commission shall not make any incentive element applicable to any type of freight car if the Commission finds that the supply of such type of freight car is adequate. The Commission may exempt such incentive element from the compensation to be paid by any carrier or group of carriers if the Commission finds that such an exemption is in the national interest.

Private car and carrier proponents.—Proponents, on the other hand, contend that the legislative history of the amendment to section 1(6) supports the Commission's jurisdiction. In this regard, it is pointed out that the House Committee and Senate Report indicates that section 1(6), as amended, "requires the Commission to establish rules and regulations for the computation of demurrage charges so that freight car utilization is maximized and car owners receive adequate compensation." Final Conference Report, S. Rep. 94-595 and H.R. 94-781, 94th Cong., 2d Sess. 135 (1976). In addition, proponents contend that the "national needs" for maintenance of an adequate freight car supply are not being met under the traditional demurrage system because lines which do not invest in cars are being rewarded at the expense of actual investors. However, if demurrage charges are paid in part to car owners, such charges will increase the car owner's return on its investment and will thereby be an added incentive to purchase additional cars. This, proponents stress, will help maintain an adequate freight car supply.

The U.S. Department of Transportation (DOT) contends that one of the goals of Congress in enacting the 4RA was to encourage the purchase, availability, and efficient utilization of cars. This is reflected in the amendments to section 1(6) and 1(14)(a) of the act, which the DOT argues, require a complete reassessment by the Commission of all rules governing freight car acquisition, maintenance, distribution and utilization. It is submitted that this proceeding is too narrow and does not adequately deal with these concerns. Proponents, therefore, recommend that this proceeding be suspended and a broad investigation of the best methods to assure sufficient availability and utilization of freight cars be instituted.[7]

7. The Union Pacific Railroad Company filed a response to the DOT's statement, referring to it as a motion to suspend the instant

Conclusions.—The legislative history of the amendment to section 1(6) of the act and the wording of the section itself establishes the Commission's jurisdiction to remit excess demurrage charges to car owners to provide them with adequate compensation for the use of their cars. The Joint Explanatory Statement of the Committee of Conference, Report 94-768, p. 128, 94th Cong., 1st Sess. (1975), states that:

> The House Amendment requires that rules and regulations be established for the computation of demurrage charges so that freight car utilization was maximized.
>
> Conference Substitute
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> The conference substitute follows the House Amendment, but insures the Commission will consider the transportation use [sic] the car and provide a fair return on investment in freight cars.

Further evidence is presented that the legislature indicated that charges contain a compensatory element. In the Joint Explanatory Statements of the Committee of Conference, Report 94-781, p. 142, 94th Cong., 2d Sess. (1976), two different breakdowns for sections 1(6) and 1(14)(a) indicate that demurrage charges can be used to compensate owners of cars as well as per diem charges. The report states that the proposed legislation:

> (13) requires the Commission to establish rules and regulations for the computation of demurrage charges so that freight car utilization is maximized and car owners receive adequate compensation;

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7. (Cont'd.)
proceeding. The statement is in the form of a recommendation, is not separately titled as a motion, and, therefore, will not be considered as a motion but as a request or recommendation.

> (14) reforms existing law with respect to compensation when one carrier pays for the use of a freight car owned by another carrier. * * *

Specific mention of this proceeding is also made in the Report of the Committee on Interstate and Foreign Commerce, Report No. 94-725, p. 241, 94th Cong., 1st Sess. (1975). In discussing the Commission's continuing activities in the area of demurrage, it stated that:

> The purposes of the proposals are to create an added incentive for the car owner to acquire additional cars and remove any inducement to the nonowner to encourage detention of foreign cars in order to benefit from collection of demurrage charges.

Thus, the legislative history of section 1(6) clearly indicates that the Commission is not restricted to section 1(14)(a) of the act in providing an incentive for car owners to acquire additional cars. The amendment provides another basis of jurisdiction in addition to the Commission's car service authority discussed in the interim report (349 I.C.C. 411, 415). Freight car supply will be fostered under the rule as investors receive a greater return on their investment, which will be an added incentive for the purchase of additional cars. As more fully elaborated in the Discussion and Conclusions hereinafter, the proposed rule clearly will fulfill the purposes of section 1(6) by meeting the Nation's needs for the maintenance of an adequate freight car supply. Therefore, we find that the Commission has jurisdiction to promulgate the proposed rule.

In regard to the request of the DOT to suspend this proceeding in favor of a broader investigation, any further delay in the ultimate determination of this proceeding

would only complicate and postpone the Commission's efforts to alleviate car shortages. The request will, therefore, be denied.

ADMINISTRATIVE COSTS OF IMPLEMENTATION.

Private car and carrier proponents.—Carrier and private car proponents argue that the railroads presently require sufficient recordkeeping data to institute the proposed new demurrage remittance scheme with minimal expense. Proponents point out that railroads presently keep accurate demurrage records showing car ownership and number, constructive placement date, actual placement date, date of release, amount of demurrage, et cetera. Accordingly, they conclude that the only additional burden that will be placed on the delivering road is the computation of the arbitrary or excess demurrage charges.

Some private car proponents feel that opponents to the rule have exaggerated the administrative startup and annual costs of the remittance to include installation of new computer systems and other extraneous expenses which would be incurred even without the adoption of the rule. They argue that railroads could use demurrage bureaus and other associations to handle the administrative and recordkeeping functions and provide the necessary auditing safeguards, which exist in the present system. Costs would, therefore, be minimized. No direct evidence of the costs of the proposed rule was provided by private car proponents, as this information was thought to be within the knowledge of the carriers.

It is also pointed out by private car proponents that the extension of the rule to private car owners will not result in excessive administrative costs. Tariffs presently provide for the payment of mileage allowances to private car owners on tank cars and nontank cars. Railroads also

keep accurate records of the movement of private cars over their lines; data is gathered and consolidated; and payments are made on a "fleet" basis to the private car owners. Therefore, a framework for the proposed rule is said to exist already.

The two carrier proponents, the Burlington Northern (BN) and the Union Pacific Railroad Company (UP), submitted data on the costs of implementing the rule on an individual basis. They used the last 6 months of 1973 as their study period. They state that the present record-keeping system can provide the necessary information, although an expanded computer printout to display the required data would be needed by the BN and the UP would have to modify its average-agreement forms. Startup expenses for BN would be $2,500, and for UP startup would be $1,950. Annual expenses thereafter would be $48,180 for the BN and $16,000 for the UP, for additional personnel.

Carrier opponents.—The Association of American Railroads (AAR)[8] estimates that the annual costs of administering the rule will range between $1.5 and $2 million. It submits an estimated startup and annual cost for 89 railroads which total approximately $500,000 for the former costs and over $1.5 million in annual administrative expenses. These additional costs are based on the projected need for additional employees (auditors, clerks, and supervisors), forms, travel, and computer expenses. Some of the carriers indicate that the methodology needed to implement the rule was used in preparing the cost data presented to the Commission. The following table shows the costs for 12 selected railroads (including the 2 carrier proponents, the UP and BN).

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8. The AAR represents all its members except the BN, UP, Denver & Rio Grande Western Railroad Company, and Pittsburgh & Lake Erie Railroad.

TABLE 1
Estimated startup and annual costs

Carrier	Startup	Annual
Atchison, Topeka & Santa Fe Railway Company ..	$ 4,350	$ 48,070
Burlington Northern, Inc.	2,500	48,180
Chicago and North Western Transportation Company	17,200	99,063
Chessie System	31,184	208,366
Florida East Coast Railway Company	500	10,000
Illinois Central Gulf Railroad Company	135,000	133,200
Missouri Pacific Railroad	7,484	80,834
Norfolk and Western Railway Company	6,500	110,954
Penn Central Transportation Company[1]	77,945	332,713
Southern Railway System Lines[2]	.....	224,000
Southern Pacific Transportation Company	7,512	46,500
Union Pacific Railroad Company	1,950	16,000

1. Now a part of ConRail.
2. Costs without using a demurrage bureau.

Cost data was also presented by three demurrage bureaus. The bureaus believe that the costs of administering the rule would be lower if necessary accounting and auditing functions were done on a group basis as is presently done on a large portion of charges for demurrage, detention storage, and average agreements. While, additional expenses will still be incurred in implementing the rule (for personnel, forms, travel, and computer expenses), on a group basis these costs will assertedly be less than if each railroad performed the functions individually. The foreseeable costs which would be prorated among the bureau members are estimated as follows:

TABLE 2
Costs of demurrage bureaus

Bureau	Startup	Annual
Pacific Car Demurrage Bureau (for 34 member railroads)	[1] $12,129	[2] $ 87,129
Southeastern Demurrage and Storage Bureau (for 58 member railroads)	15,032	208,392
Demurrage, Western Weighing and Inspection Bureau (for 91 member railroads)	.....	397,464

1. This represents costs for new forms which it appears would be used throughout the year, and, therefore, is not an accurate startup cost.
2. The annual estimated cost will be $110,000 more if the bureau polices the rule where there are no regional bureaus certifying the amount.

Only three railroads, the Chessie System, Penn Central Transportation Company (PC) (now a part of ConRail), and Southern Pacific Transportation Company (SP), specifically indicate that their costs include the amounts to be paid the demurrage bureaus.[9] Therefore, it is unclear whether the costs submitted by the other individual railroads are costs which (1) would be incurred if the demurrage bureaus were not utilized, (2) would be incurred in addition to the costs reported by the demurrage bureaus, or (3) include individual costs and costs payable to the demurrage bureaus.

To obtain an indication of the administrative costs if demurrage bureaus were utilized, we took the number of excess demurrage days presented by the Pacific Car Demurrage Bureau's members and divided that by the prorated costs to the members.[10] The startup and annual cost for each excess day is $0.035 and $0.2514 respectively.

The American Short Line Railroad Association (ASLRA), utilized cost data submitted by 46 member lines [11] to project the costs of administering the rule for its

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9. The Pacific Car Demurrage Bureau, and nine Demurrage, Western Weighing and Inspection Bureau members' costs were their allocable portion of the demurrage bureau costs. The 21 members of the Southeastern Demurrage Bureau did not present individual prorated costs, only the total costs to the bureau of all its members.

10. The bureau submitted the prorated costs to the individual roads so that we could compute the charges for each excess day. It was the only bureau to provide us with this breakdown. The startup cost is not totally accurate as it represents the cost of new forms which would be used throughout the year. The startup and annual costs per excess day represents the costs prorated over the annualized excess days.

11. One member of the ASLRA study group is the Cedar Rapids and Iowa City Railway Company (CRANDIC) which also submitted data to the AAR. There could be other overlaps in the ASLRA's projection of costs to its total membership if demurrage bureaus have also submitted costs for the same road. However, from the evidence presented, we are unable to calculate the fre-

214 member lines. The expenses based on a per-car-handled basis (which includes all revenue cars handled and not just arbitrary cars) are as follows:

TABLE 3

Additional administrative expenses of rule for A.S.L.R.A. membership

Railroads	Total cars handled	Expenses per car	Total expenses
Class I Switching and Terminal	3,687,518	$0.035	$129,063
Class II Switching and Terminal ...	995,944	.081	80,671
Class I Line-haul	1,508,202	.0115	173,443
Class II Line-haul	1,703,935	.0115	195,953
Total	7,895,599	....	$579,130

These figures are based on data submitted by the study group carriers for the time and cost of preparing the administrative study (which was done on a manual basis). These costs do not include the auditing, claims or overhead expenses associated with the proposed rule. ASLRA states that if these expenses were added to the above figures, the total expenses would be $1 million annually. It is argued that such an increase in administrative costs is a needless and unjustified waste of carrier revenues.

The rule can either be implemented by the reporting roads on a manual or computer basis, or the administrative functions could be turned over to demurrage bureaus or other carrier associations. Costs would vary accordingly. Assessments of individual implementation of the rule are provided by the Chicago, Milwaukee, and St. Paul and Pacific Railroad (CMSP) and the Chicago and North Western (CNW). Assessments of demurrage bureau imple-

11. (Cont'd.)
quency of this double reporting. The ASLRA study group included 27 members in the eastern territory, 7 in the southern territory, 2 in the western territory, and 3 in the Mountain Pacific territory.

mentation are provided by the Pacific Car Demurrage Bureau (PCDB) and Southeastern Demurrage and Storage Bureau (SFDSB).

The CMSP states that if the proposed rule were put into effect, it would have to develop an entirely new system for accumulating demurrage records. This would mean converting its present manual method into a computerized system. Such a changeover would entail new forms, converting present records into machine-processable records, and computer programming. After these initial startup programs (amounting to $142,800), CMSP also indicates it would incur $714,350 annually in administering the rule. This figure is based on the costs of 5 keypunch operators, 1.52 full-time computer programmers, 15 auditors and 3 supervisors. The startup and annual costs for CMSP for each excess demurrage day are $1.0893 and $5.4493, respectively.

The CNW indicates that it would implement the rule on a manual basis, as is presently done with its demurrage records. Employees would record the car initial and number, name of car owner, station accounting number and name, miscellaneous bill date and number, number of excess demurrage days, and amount of refund to car owner. It would also maintain a list of payments made at stations, which would be verified against billings. After verifications are made, cars would be drawn off listings and classified by car owners for payment. The startup and annual costs for each excess day are $0.1028 and $0.5921, respectively, for CNW.

The PCDB presently receives from its members a monthly copy of demurrage records covering all cars re-

12. The expenses are based on averaged data from the first quarter of 1975 for the 46 roads in the ASlra's study group. These costs were projected to the entire membership by multiplying the number of cars handled in 1974 for each class and type.

ported. These reports are reviewed for possible under- and overcharges, and claims are handled by the Bureau. Under the rule it would also determine the amounts due from other railroads and certify that the proper remittance was made between carrier members and other railroads. It anticipates that if the rule goes into effect, it would need six additional clerks to analyze each demurrage record for possible remittance to car owners, and for further review if claims are presented and adjustments made. A separate filing and posting system would also be needed, a number of forms would have to be revised, and several new six-part forms printed to cover remittance and record of cars to car owners.

The SEDSB reviews records to determine charges exceeding the value of $10 per car per day, identify car owners, car initial and number, station, date of demurrage or detention bill, and amount due. On average agreements, it will require a complete restatement of all cars for industries which habitually delay cars. Under the proposed rule the excess amount will be identified as to the car owner, and auditors will review railroad accounts to determine if proper amounts are paid. Both the SEDSB and PCDB will assure the proper transfer of funds for railroads in other territories, with the understanding that similar bureaus in other territories will do the same. They state that otherwise the rule will be impossible to administer, AAR replies, based on the evidence presented in all the initial statements, that the annual cost for administering the rule is approximately $3.5 million dollars.

The following table is our summary of the costs of the proposed rule as alleged by respondents. It is based on data submitted by 42 roads for the period July 1 through December 31, 1973.

TABLE 4

Costs for implementing proposed rule

I. Startup expenses	
(1) Lowest startup expense (Sunset Ry.)	$6.00
(2) Highest startup expense (CMSP)	142,800.00
(3) Average startup expense	14,219.00
II. Annual expenses	
(1) Total annual expense for 41 roads	$2,768,740.00
(2) Annualized number of excess demurrage days	3,068,004.00
(3) Average cost per excess day	$0.9025

Replies.—In reply, proponents reiterate their views that the carrier opponents are exaggerating the costs of the program. BN states that if only 25 percent of its demurrage revenues were remitted, the administrative expenses would only amount to 4.23 percent of total demurrage charges. Private car owners, Duval Sales Corporation, Evans Products Company, International Minerals & Chemical Corporation (Duval), state that for 19 selected railroads the cost to remit the excess charges to private car owners for the period July 1 through December 31, 1973, is $134,376. When this is divided by the number of penalty demurrage days (184,950), the cost is 73 cents a day. Since the cost of administering the present demurrage program is $6 a day, the administrative cost is said to be more than adequately covered by the $10 to be retained by the delivering carrier.

ADEQUACY OF $10 MINIMUM

Private car and carrier proponents.—Private car and carrier proponents argue that the sum ($10) to be retained by the delivering carrier is adequate compensation to cover the administrative expenses of the rule, per diem, and the switching expenses associated with the delivery of the car.

Proponents state that the average per diem charge to be paid to owning railroads during periods of demurrage

is approximately $4. Thus, the remaining $6 is arguably more than adequate to cover charges associated with the delivery of the car. They cite *Ormet Corp. v. Illinois Central R. Co.*, 341 I.C.C. 647 (1972), where the Commission held that in providing relief from penalty demurrage charges, the delivering railroad should retain $4 per car per day to offset per diem plus 20 percent thereof for administrative costs. This expense, it is noted, falls far short of the $10 to be retained by the delivering carrier under the proposed rule. Moreover, this is especially true in cases where payments are made to private car owners since there are no per diem charges.

In cases where delivering carriers have shown per diem and switching charges in excess of $10, proponents note that it has not been established whether these costs are representative, or their percentage of the total number of cars involved. In addition, proponents contend that these costs should not be considered controlling in determining whether the $10 is adequate because the level of line-haul rates is set after considering per diem expenses and switching costs. Proponents state that it is a common practice to extend the line-haul car costs to include an average of 4 days at origin and 4 days at destination, citing "Rail Carload Cost Scales for 1973," ICC statement No. 1C1-73, p. 137. Proponents note that Rail Form A unit costs also include the added expenses incurred in switching cars to and from hold tracks. Therefore, proponents conclude, a carrier is compensated for its expenses by its division of the freight rate, and if any cost adjustment is needed, it should be in the line-haul rate.

Carrier opponents.—Opponents state that generally cars which incur demurrage in excess of $10 a day are those which have been constructively placed on railroad-owned tracks. Additional switching is necessary for these

cars when (a) the delivering road moves the car to a holding point, (b) cars held at these points are repositioned as other cars move in and out, and (c) actual delivery is made. Additional costs are also incurred for track and protective services.

Opponents note that each additional switch is an added expense for the delivering road in terms of actual switching costs and administrative expenses necessary to record the position of the cars. For example, CMSP indicates 10 minutes of additional time is needed per switch—which costs $12.94. Such costs, carrier opponents maintain, will not be covered by the $10 to be retained by the delivering road.

The Boston and Maine (B&M) submitted a study of daily conditions and locations of cars for July 1973, to illustrate that switching costs are not covered by the retained $10. Out of 1,091 cars handled, 638 were identifiable as having excess demurrage. On these cars there were 1,900 switching movements which would cost between $34.06 and $44.08 if they were intraplant or other than intraplant secondary movements, respectively. Based on these figures, the switching costs would be between $64,714 and $74,233. But if the proposed remittance were in effect, B&M indicates that $56,865 would have been remitted to the car owner and, consequently, the B&M would have suffered a loss of over $10,000.

The ASLRA also argues that per diem expenses are not met by the retained amount. It submits that class II railroads normally are not accorded per diem reclaim by connecting carriers. Although, in theory, the short lines' division of the fixed arbitrary and terminal lines per diem reclaim allowance makes the switching and terminal lines whole for their per diem responsibility on backhaul cars interchanged with the trunklines, in fact, according to

ASLRA, this is not so. ASLRA states that "shortfalls" can occur (1) when the holding line assesses a local revenue charge on shipments; (2) when there is a high turnaround of relatively low per diem equipment and low turnaround of higher rated equipment (a further discussion of this point is contained in the section on average agreements); and (3) when there are changes in patron volume, detention times, or equipment value.

Taking the average of the ASLRA study group carriers (except those not within the normal range indicated by the average for other railroads), demurrage retained exceeds per diem by only 22 cents per car handled. Of the 25 class II line-haul short lines in its study, ASLRA states that all but 2 would have net per diem costs exceed demurrage income by amounts ranging from 47 cents to $27.47. (See appendix A.) The statement presented by one of its members, the Meridian & Bigbee Railroad, submits that it presently collects in demurrage revenue only 15 percent of its per diem car costs on an annual basis. The proposed rule would, therefore, aggravate a presently critical situation.

Although opponents concede that demurrage is not considered a source of revenue, they argue that the money derived from demurrage is vital to offset additional operating costs which directly relate to the detention of equipment and car-hire costs during detention. Demurrage is also used to offset high-value equipment placed on assignment to delivering roads by car owners on which per diem rate exceeds the storage charge. The loss of this revenue, according to opponents, could force marginal lines into bankruptcy. Opponents conclude that the $10 to be retained by the delivering road is inadequate.

Replies.—Proponents reply that opponents of the rule have not established that, overall, the $10 to be retained

by the delivering road is inadequate to meet costs.[13] However, in those limited instances where costs are not met by demurrage, it is maintained that the division of the line-haul rates should cover these costs.

Opponents continue to argue that costs incurred by the delivering railroad are not covered by the $10 portion of the demurrage charge. The ASLRA states that the minimum detention to the point of the first arbitrary day is 7 days. Thus, a carrier has 1 or more days of per diem before demurrage begins. Yet, no line-haul rate or division of rates contemplates covering costs for 7, 8, or 9 or more days of per diem responsibility before the assessment of demurrage for the first arbitrary days begins.

Average Agreements and Runaround Claims

There is some question whether average agreements would be difficult or impossible to utilize under the proposed rule. In an average agreement, a shipper offsets the early release of a car (credit) against a late release (debit). Excess debits are then billed at $10 and arbitraries (which cannot be offset by credits) are billed according to the different level of charges on a monthly basis without regard to car ownership.

Private car and carrier proponents.—Proponents foresee no problems with average agreements. They contend that data for determining charges is available from existing average agreement forms since the car initial, number, and date placed and released are specified. Remittance is not affected by "free" and $10 days, but only days in excess of $10, and, therefore, the rule would have no adverse effect on average agreements. The UP proposed the follow-

13. The Norfolk and Western Railway Company in its reply states that if remittance is ordered, then the $10 limit should not be altered to reflect added switching expenses as these are covered in the Rail Form A unit costs.

ing method of computing charges under the average agreement: chargeable days for average agreement multiplied by $10 equals the amount chargeable at $10 a day. Then the amount chargeable at $10 a day is divided by the number of debit days per average agreement to equal the amount apportionable to each car owner per each debit day.

Carrier opponents.—Rail carrier opponents, on the other hand, state that if the proposed rule goes into effect, average agreements will have to be canceled. They argue that under an average agreement if each credit has a value of $10 in offsetting debits, the delivering carrier could suffer a net loss when per diem and switching costs are not adequately covered by demurrage charges retained by the carrier. It is also contended that cars with high per diem can be used to offset low per diem cars, so that a delivering carrier cannot collect enough demurrage to offset the car costs of the high—value per diem equipment. For example, a $3.50 per diem charge for a coal hopper could offset a $22.88 per diem charge for a 60-foot boxcar.

Examples of the problems created by average agreements were cited by the SEDSB. If each credit has a value of $10 in the offsetting of debits, it states that an anomalous situation would develop. On one average agreement, reflecting a total of 64 cars, $900 in demurrage charges were assessed, with $240 representing possible pay out to foreign railroads. Yet, there would be per diem and switching charges of $845.09, so that the delivering carrier would suffer a net loss of $185.09. In another instance, an average agreement covering 231 cars involved total demurrage charges of $4,770 with related costs of $6,366.11. Under the proposal $900 would be remitted to the car owners.

Opponents also contend that the purpose of the rule would be thwarted by "runaround" claims. Runaround

occurs when newly arrived cars are placed for unloading before previously arrived cars held under constructive placement. A runaround claim lists all cars in the order of arrival and constructive placement dates. The placement date of the first cars is then substituted for the date of the first constructively placed car and demurrage is recalculated on the basis of substituted dates. Therefore, the owner whose car was actually detained might not receive the penalty charge. Similar situations assertedly would result in claims for bunching, weather interference, and frozen or congealed lading.

Members of the PCDB also suggest that consideration be given to delaying the remittance of the excess charges under average agreements for a period of 6 months to review for correctness and to minimize the handling of monies between the carriers.

Replies.—Proponents deny that there will be any problem with average agreements since debits, credits, and free days are not in issue because such matters affect unchargeable days before penalty demurrage commences. BN also states that runaround and bunching problems are resolvable and will be minimized by identifying car-ownership under this proposal.

CLAIM PROBLEMS.

Private car and carrier proponents—Proponents also foresee no problem with claims by a shipper against a railroad for excessive charges already paid as this is said to rarely occur. However, if the carriers desire protection against car owner bankruptcy, a bond could be posted by the car owners. In other instances, if there is a valid claim, the delivering road could withhold future payments to the car owner until the appropriate amount is accounted for.

Carrier opponents.—Carrier opponents state that they should be protected against claims for demurrage charges paid and remitted which are not applicable. They also submit that the threat of a lawsuit may force them to drop a claim which they might otherwise file lest the cost of the suit deplete or exceed the demurrage charges that the delivering road would be entitled to under the rule.

LEASES.

In the interim report, the Commission determined that in a lease situation, the lessee of the car should be considered the owner. Both proponents and opponents contend, however, that the only practical approach in leasing arrangements is for the delivering road to remit the excess charges to the lessor or owner of the reporting marks (those marks assigned to cars by the AAR), as is currently done with mileage allowances.[14] The lessor and lessee could adjust the lease to take into account the remittance to the lessor. The burden of recordkeeping would then be on the car-owning company.

Allied Mills [15] states that if any controls are necessary in lease situations, ones similar to those imposed under the mileage rules should be used. This would prohibit the car line from refunding to the lessee demurrage charges in excess of the rental expenses to the private car lines.

REMITTANCE TO PRIVATE CAR OWNERS AND EARMARKING.

Private car and carrier proponents.—Private car proponents stress that they should be included within the

14. Hercules, Inc., asks that the Commission determine when the free time begins on the trip-lease cars.

15. Allied Mills states that the Commission was incorrect in its interim report in stating that Allied Mills favored remittance of all demurrage charges. It only favors remittance of charges in excess of $10 per car per day.

proposed rule, a conclusion already reached in the interim report. They argue that they are the ones damaged by the detention of their equipment and are, therefore, entitled to be compensated. To hold otherwise, assertedly, would be discriminatory.

It is also contended that private car owners are supplying an ever-increasing proportion of the Nation's freight cars (between 1972 and 1974 private car owners and shippers added 35,711 cars to the transportation system), while carriers who have not increased their car supply are reaping the benefits of the investments of others by retaining excess demurrage charges. Archer Daniels Midland shows that the national car fleet expanded (primarily because of private investment) from the years 1972 to 1974 by a total of 3,636 cars; however, the carrier fleet decreased by 32,075 cars. Such a significant portion of the investors in freight cars, it is argued, cannot and should not be excluded from benefiting from the proposed remittance scheme.

Carrier opponents.—Some carrier opponents contend that the Commission will err in extending the rule to private car or lessor/lessee owners (which as already noted was found appropriate in the interim report). They argue that private and carrier car owners have traditionally been treated differently by the Commission and that no justification has been presented in this proceeding for disregarding that distinction. They note that railroads have the responsibility of furnishing cars, and, thus, alone are entitled to retain excess demurrage charges. They also argue that the funds should not be remitted to the private car owners because they have not invested in cars which are in short supply, but rather in cars that are in surplus, such as tank cars and covered hoppers. The BN (a proponent of the rule in other respects) also fears that if private car owners are included, it would be counterpro-

ductive for they will have less of an incentive to release cars on time since they themselves would receive the excess demurrage charges. Lastly, the AAR argues that remittance of the charges to private owners is an unlawful rebate in violation of section 15(13) of the act which requires that payments to car owners not exceed reasonable costs.

Replies.—In reply to the allegations that the remittance to private car owners violates section 15(13), Bay State Milling Company argues that the statute applies to "excess allowances from railroad funds for railroad services performed by the shipper." As the proposed rule applies to the disposition of excess demurrage charges paid, section 15(13) is argued to be inapplicable.

If a remittance is allowed to private car owners, the AAR urges a downward adjustment in car-mileage payments and that the funds be earmarked for purposes beneficial to railroads and shippers alike, such as research and development in freight car design.

Earmarking.—In all other respects, opponents and proponents of the rule agree that there should be no earmarking of funds. Private car owners point out that there is no law which requires parties, other than common carriers by railroad, to purchase and supply railroad freight cars, and, therefore, that there is no statutory basis for earmarking of funds.

Participants also agree that earmarking would not be in the best interest of car owners. They foresee policing problems and questions as to whether it may be feasible or necessary for car owners to purchase additional cars with the fund. Forced acquisition, the carriers claim, would also distort car investment which takes into consideration factors such as freight and car-hire revenue. As in *Demurrage Rules and Charges Nationwide*, 340 I.C.C.

83, 90 (1971), it is argued that earmarking be found unwarranted.

Car Utilization and Supply

Private car and carrier proponents.—Even though they believe funds should not be earmarked for the purchase of additional cars, proponents contend that general economic principles dictate that if car owners are compensated for being deprived of their freight cars, their incentive to purchase cars will be stimulated. They agree that the Commission was correct in holding in the interim report that the proposed rule will have a positive impact on car supply.[16]

Carrier opponents.—Carrier opponents, on the other hand, argue that the proposed rule will not increase freight car supply. They argue that the additional purchase of freight cars may be curtailed as funds once available to the delivering road will now be consumed by the administrative costs of the program or be totally lost when remitted. They further contend that the loss of these demurrage funds (there is no increase in the charge to offset the loss), will have a serious impact on roads experiencing financial difficulties. (The ASLRA states that its 1973 study group derived 3.5 percent of their gross revenue, 7.6 percent exclusive of local traffic, from arbitrary demurrage.) It is also suggested that the rule might discourage the collection of demurrage charges and decrease car utilization since the rule only applies to charges actually collected and not billable demurrage. This would, in turn, have a

16. A number of private car proponents did not state whether they thought the rule would increase car utilization and supply. However, they stated that if the rule was warranted, its application should be extended to private car owners.

detrimental effect on the shippers' incentive to release cars quickly.[17]

Carriers submitted data showing the amount of demurrage charges to be remitted to carrier and private car owners. Generally the study period was July 1 through December 31, 1973. Participants agree that this test period does not accurately reflect the amount of demurrage normally chargeable, for during this period Car Service Order No. 1124 was in effect for approximately 91.69 percent of all cars. It is estimated that Service Order No. 1124 inflated the amount of demurrage subject to remittance by as much as 53 percent for the N&W; 67.55 percent for AAR member roads; and 55 percent for the Penn Central. It is, therefore, argued that the amount to be remitted when compared to the administrative costs of the rule does not justify the proposal.

Appendix B shows the amount of demurrage to be remitted between various roads, and appendix C shows the amount to be remitted to specified private car owners by certain selected roads. Since not all railroads participated in this proceeding and since the reporting roads generally did not know how much demurrage would be received from other roads under the rule, it cannot be determined what the total amount remitted compared to the total amount received by a particular road would be. However, based on the data submitted by reporting roads for the last half of 1973, the amount of demurrage to be remitted can be estimated. The following table is our summary of these amounts as reported by 42 reporting roads. (See appendix D.)

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17. Carriers argue that there is no indication in the present record that presently large sums of demurrage remain uncollected or that carriers can or have the ability to influence a shipper to detain cars longer than necessary.

TABLE 5

Amounts of demurrage payable to foreign railroads and private car owners, assuming the proposed remittance rule had been in effect during the July 1 through December 31, 1973, study period and the number of demurrage days reflected by these amounts

(1) Total amount of demurrage payable to foreign railroads, assuming the rule had been in effect during the study period	$37,752,616
(2) Total number of demurrage days reflected in line 1	1,650,127
(3) Average amount payable to foreign railroads per demurrage day	$22.88
(4) Total amount of demurrage payable to private car owners assuming the rule had been in effect during the study period	$2,634,839
(5) Total number of demurrage days reflected in line 4	122,579
(6) Average amount payable to private car owners per demurrage day	$21.50

Opponents contend that the amount to be remitted to the car owner would not affect decisions to purchase additional cars. The SP, for example, states that demurrage revenues are too insignificant and too unpredictable to influence a decision of whether additional equipment is needed. Demurrage accounts for less than 2 percent of its freight revenues (or only 1 percent of car-hire revenues). SP states that based on its demurrage revenues in 1974, it received $250 per car. If the excess amount remitted were an additional 25 percent, this would only be $62.50 more, and represents less than 2 percent of its threshold revenue requirement of at least a 10-percent return on investment after taxes.

Lastly, opponents argue that car owners, although given the opportunity to commit themselves to purchase additional cars, have failed to do so, which is said to seriously put into question the Commission's conclusion that the Nation's car supply will actually increase. CRANDIC suggests that a more direct and less expensive way to solve the car shortage problem would be to reduce the amount

of free time, do away with average agreements, and implement detention charges for storage of empty private cars.

Replies.—AAR answers that even if all the money remitted to private car owners was used to purchase additional cars, this would only amount to between $21 million and $26 million (based on a 50- to 60-percent reduction of actual demurrage charges payable for the 6-month 1973 base period to account for Service Order No. 1124). At $35,000 a car only 75 additional cars could be purchased, which would not appreciably increase car supply. Moreover, there is no guarantee that the money remitted will be used for this purpose. Because of such a limited impact and the assertedly high cost of administering the rule, AAR concludes that its adoption is not warranted.

Discussion and Conclusions

As stated in the interim report, in order to adopt the proposal, we must be satisfied that the rule will achieve its intended purpose of increasing car supply and utilization, will be administratively feasible, and the benefits of the rule will outweigh the expenses incurred in its implementation. We have previously discussed in the interim report the positive impact the rule will have on car utilization and supply, and therefore, a detailed discussion of our conclusions is not necessary, although we would like to reemphasize some conclusions we reached therein.

First, inadequacy of car supply has been a recurring problem in the Nation's carrier fleet. Congress has specifically recognized the problem and amended section 1(6) of the act to insure that an adequate car supply is maintained. While the Commission has taken numerous steps to alleviate car shortages by increasing incentive per diem, short-

ening the length of free time, and issuing car service orders in addition to other innovations in this area, the problem remains. The proposed rule, we believe, will contribute to the Commission's continuing policy of encouraging the maintenance of an adequate freight car supply.

Carrier opponents argue that there is no guarantee that the amount of money to be remitted will be utilized by carrier or private car owners to purchase additional cars because, indeed, there has been no commitment to do so by these parties. However, this argument overlooks the fundamental economic proposition that a greater return on an investment will provide an increased incentive to invest in that item, whether it be stocks, land, or as in this case, freight cars. Return on investment may not be the sole factor in determining whether an investment in freight cars is made, but its influence cannot be disregarded.

As demurrage regulations presently exist, the delivering carrier, who may not own one freight car, is nevertheless entitled to the entire demurrage charge even though this sum may far exceed any costs incurred. In addition, there is no indication that this demurrage revenue is presently being used by the delivering road to purchase additional cars. This money is, therefore, a bonus to a carrier who has no interest in whether or not a car is being detained. However, the car owner, whether private or foreign road, has its equipment detained and unavailable for further use, and thereby loses revenue. This is especially true of private car owners who do not receive per diem but a mileage allowance. This remitted amount which table 5 shows is approximately $22 for each excess day ($11 if it is assumed that Service Order No. 1124 inflated demurrage by 50 percent), which SP estimates to be approximately $62.50 a car annually, will be an added dividend to car owners. When these figures are multiplied

by the vast number of cars in the transportation system, the rule will certainly have a significant positive impact on car supply.

Administrative expenses.—Those opposing the rule have argued that the costs of its administration far outweigh any benefit that can be derived from its implementation. However, the evidence of record fails to support this contention.

Carriers presently require sufficient information in their present demurrage forms to calculate the demurrage charges in excess of $10 a day. It has been adequately demonstrated that the rule is feasible from a recordkeeping and administrative viewpoint with employees or computers drawing the necessary information from existing or slightly modified demurrage forms. In addition, if demurrage bureaus are utilized, the implementation of the rule would be simplified, as there presently exists a framework for tabulating demurrage and auditing records.

Costs, of course, will be incurred in implementing and administering the rule; but it has not been shown that these costs will be excessive. Where a carrier data shows high implementation costs, such costs in many instances are attributable to instituting a computer system where none previously existed or to hiring additional employees to do the computation on a manual basis. However, a large portion of the data on implementation costs does not specify whether the estimated costs (both startup and annual) would be incurred if demurrage bureaus were used, or if the costs are individual expenses in addition to the prorated charges of the bureaus. Costs not based on the use of demurrage bureaus, where expenses would be significantly less than an individual's expenses, significantly inflate the costs to implement and administer the rule, and thus, appear to overstate the actual amount needed.

Indeed, it has been clearly shown that demurrage bureaus can significantly cut the costs of administering the remittance scheme by economies of operation since, in most instances, the existing staff, machinery, and facilities, with slight modification, can be used to implement the proposal. Based on the data submitted by the three reporting bureaus, startup and annual expenses for administering the rule for 183 members would be $30,439 and $692,985, respectively. Using data submitted by members of the PCDB, annual and startup costs for each "excess" day, would be $0.251 and $0.035, respectively. These figures, we believe, more accurately indicate the costs of the proposed remittance scheme if demurrage bureaus are used, although we realize that carrier members may have certain expenses in addition to those of the bureaus.

In conclusion, we realize that the cost data submitted by many of the reporting roads is inflated and that many of the expenses are unsubstantiated. (For example, a carrier states that it needs four additional employees but it does not indicate how it arrived at this figure.) However, despite our reservations as to the accuracy of the cost data presented, even taking it at face value, we are nevertheless unable to find that the costs of administering the rule are excessive. As can be seen from table 4, average startup expenses of $14,219 and annual expenses of approximately $0.90 for each excess demurrage day are not unreasonable, unjustifiable, or unduly burdensome. Even if expenses were slightly higher, the evidence of record still supports the finding that the costs of administering the rule are not prohibitive.

The record also indicates that in terms of cost-benefit, the proposed rule is justified. Table 5 shows that the total amount of demurrage that would have been remitted for the period July 1 through December 31, 1973, to private and foreign car owners by 42 roads is $40,387,455. Even

if we discount the effects of Service Order No. 1124, which inflated this figure by an estimated 50 percent, $20,193,727 would still have been remitted to car owners during this 6-month period. This discounted amount would constitute between a $10 and $11 return on a car owner's investment for each excess demurrage day. When this amount is compared to the costs of administering the rule, it becomes evident that the costs are not so burdensome as to outweigh the rule's benefit in providing an incentive for the purchase of additional equipment and, thereby, in increasing car supply.

Inadequacy of amount.—It has been contended by some carrier opponents, especially the ASLRA, that the $10 to be retained by the delivering road is insufficient to meet delivering carrier costs (per diem, switching, and administrative expenses).

The switching costs are reflected in the line-haul rate by Rail Form A's unit costs. These figures are based on average costs for a particular region and are used to calculate the switching costs associated with line-haul movements. Per diem expenses are also used in computing the line-haul rate. Therefore, it is incorrect to assume that the $10 to be retained by the delivering roads is the only source of revenue available to cover switching costs and per diem expenses. Since the evidence indicates that these costs in certain instances are not presently recoverable from demurrage charges (although it is not clear whether the expenses are covered by other revenue), an adjustment in the reclaim allowance, switching charge, or division of rates may be needed.[18] Then, if it can be shown

18. Notice is taken of Rule 5, Code of Car Hire Rules and Interpretations-Freight, "The Official Railway Equipment Register," Vol. 92, No. 1 (July 1976). It provides that:

(a) An amount (Note 1) for each loaded car handled in Terminal Switching Service except as otherwise provided in

that the costs of the delivering railroad are not consistently being met, the carrier is free at any time to seek increases in applicable rates and charges.

The adequacy of demurrage is not in issue in this proceeding. If any carrier can demonstrate that its costs (per diem, switching, and administrative expenses) are not being met, the proper recourse is to petition the Commission to increase the amount of basic demurrage or other appropriate rate or charge. A deficiency in basic demurrage, switching charges, or other rate or charge, should not be offset by revenue from penalty demurrage. To do so would vitiate the incentive element of arbitrary demurrage and also, as noted in the interim report, deprives the car owner of part of the return on his investment. In the event that basic demurrage would be increased in excess of $10, these rules would be adjusted accordingly to provide that the car owners would receive the demurrage in excess of the higher level of basic demurrage.

Average agreements and claims.—We do not feel that average agreements present the problem that the railroads

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18. (Cont'd.)
paragraph (b) may be reclaimed by each individual switching road from the road for which the service was performed. In determining the amount, an average number of days not to exceed five (5) shall be used. The average number of days shall be determined annually, or at such other periods as may be agreed upon by the interested roads, by an examination of the records (Note 2) of each individual switching road for each local territory. However, on the request of the majority of the interested roads in any local territory, the settlement of terminal switching reclaims will be on the basis of actual time involved in handling of cars during the month for which reclaim is made subject to a maximum of (8) days on any one car and the maximum average of five (5) days per car.

Note 1.—The word "amount" as used in this ruie shall be the product of (1) average time established as an arbitrary, or actual time, subject to maximums provided in this Rule, and (2) the actual car hire rate on each car handled in switching service.

have envisioned. The proposed rule only affects demurrage in excess of $10. Under present average agreements a credit of $10 is used to offset a debit of $10, and, therefore, the delivering carrier will not receive any demurrage on a haul where no arbitrary demurrage is assessed. This will not be changed. The rule provides that the delivering carrier shall retain $10 of the charges collected, the demurrage in excess of the $10 debit up to $10 will be retained by the delivering road. Therefore, the rule will have no adverse impact on average agreements since (1) carriers presently receive no compensation for debit days which are offset by credit days, and (2) the delivering road, as in other situations, will retain up to $10 for arbitrary days which has been found to be sufficient to cover costs. It has not been sufficiently shown that a carrier's costs would not be met by the sum to be retained ($10) under average agreement. However, as in the case of our discussion of switching and other administrative costs, if it can be established that costs are not being met, the carrier can seek relief from the Commission to retain a greater amount.

We would like to make a suggestion to those who argue that average agreements are not feasible because high per diem cars can be used to offset low per diem cars and, therefore, costs will not be covered by the $10 to be retained by the delivering carrier. The per diem charge is based on numerous factors including the cost of equipment and its relative supply in the marketplace. To increase car supply and utilization, the carriers could provide that a credit and debit will not offset each other unless the per diem charges are relatively similar, i.e., within a range of 20 percent or some other figure. This would prohibit the offsetting of a $3.50 coal car with a $22.88 60-foot boxcar. This avenue of compromise should be explored before car-

riers consider implementing their threats to terminate average agreements.

Another are of expressed concern is that of runarounds. We feel that respondents can devise a method of dealing with this situation in order to fulfill the purposes of the rule in compensating an owner whose car is actually detained. Under the present demurrage system, no problem is presented because the delivering carrier keeps all demurrage, and hence no provisions are presently necessary. However, this does not mean that a solution does not exist. For example, in runaround situations, the amount to be remitted to each car owner could be determined as follows:

Total chargeable demurrage—($10 × total days all cars — Amount to be remitted subject to runaround are held) to car owners

$$\frac{\text{Amount to be remitted}}{\text{Number of days cars held}} = \text{amount per day}$$

This amount multiplied by the number of days the car was held would determine what amount is to be remitted to each car owner.[19]

19. For example: Car owned by X was constructively placed on day 1, car owned by Y constructively placed on day 2, and car owned by Z placed day 3. Car X is released day 6, Car Y released day 5, and Car Z released day 4. Demurrage is computed at $10 the first day, $20 the second, and $30 thereafter. In a runaround situation, the released dates on later-placed cars will be substituted for those of earlier placed cars. The total amount of demurrage that could be assessed under the runaround claim is $180. The total number of days held by all cars is 9 days. Therefore, the delivering carrier would subtract $90 as the amount it would retain. The remaining $90 would then be divided by the number of days the cars were actually held (9) to get the amount per day of $10. This multiplied by the days each car was held would give us the

Claims.—Next we will discuss the argument that claims against shippers for demurrage charges in some cases may not be pursued where legal fees for collecting these claims exceed the amount to be retained by the delivering road.

In addressing this contention we note that a carrier is under a legal obligation to collect demurrage charges properly assessed, and the implementation of this rule does not relieve a carrier of this duty. However, only a small percentage of claims are contested, and expenses incurred in pursuing these claims would generally be recoverable from the $10 to be retained by the delivering road. It is also noted that demurrage bureaus handle claims and prorate the costs to their members so that the cost burden is shared by a number of carriers. We, therefore, conclude that legal expenses incurred in collecting demurrage charges would not be a problem under the proposed remittance scheme. If, however, it can be shown as stated above, that costs are not being met, a carrier can seek relief from the Commission to retain a higher amount.

In situations where (a) a carrier has received demurrage charges from the shipper and has remitted this amount to the owner, and (b) it is later determined that the charges were in fact not applicable or otherwise lawfully due, then the carrier can seek direct reimbursement from the car owner or withhold forthcoming remittances until the amount is satisfied. The best method of solving this problem can best be determined, however, by the respondents themselves.

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19. (Cont'd.)
amount to be remitted to each owner. $50 to X, $30 to Y, and $10 to Z.

See section 1, rule 8, section E note 1 of the Demurrage Tariff 4-J, ICC H-59, for a thorough analysis and computation of demurrage in a runaround claim.

Private car owners.—The interim report concluded that the proposed remittance rule should also apply to private car owners. This determination was sound. An increasing percentage of the Nation's carrier fleet is owned by private interests. The evidence shows that between 1972 and 1974 private car owners and shippers added 35,711 cars to the transportation system. These investors should receive a fair return on their investment as well as carriers. Some proponents note that private car owners have made investments in freight cars without the rule and may continue to do so, if the proposed rule is not implemented. While this may be true, it is an unconvincing argument for concluding that, therefore, no additional incentive is needed. Indeed, such investments may have been much greater if the incentive heretofore had been in effect.

For those who argue that the remittance would be an unlawful rebate, we reiterate our position stated in the interim report (349 I.C.C. 411, 438), that rebates are not involved because the delivering carrier will receive its full rate and compensation for all demurrage charges and will merely remit the excess to the car owner.

In the interim report we concluded that the remittance in lease situations should be paid to the lessee. Although the Commission has held that the lessee is the car owner in considering other demurrage questions (see *Car Demurrage Rules, Nationwide,* 350 I.C.C. 777 (1975)), we feel that under the proposed rule it would generally be more efficient and administratively practical to have the excess demurrage remitted to the lessor as is done with the mileage allowance. The administrative costs would then be incurred by the lessor in determining what amount if any, should be remitted to the lessee. Existing demurrage rules as to when "free time" begins (or as the lease agreement

otherwise specified) would be controlling in determining when demurrage begins.

However, in a long-term lease of equipment by a private car owner to a railroad, the lessee should be considered the car owner as proposed in the interim report. This would simplify the administration of the rule, for the reporting marks on the car would be that of the lessee, and the delivering carrier would not be aware of the identity of the lessor, or if in fact, the car is leased.

We believe, however, that restrictions on the amounts to be remitted to private car owners are necessary to encourage and not discourage the timely release of equipment. For example, assume private car owner X is the consignee or consignor of a car on which excess demurrage accrues because of causes attributable to X. (This could occur when there is congestion on X's track, or when there are no private tracks and the car is held on carrier track.) X would pay the delivering carrier the demurrage charges and any excess demurrage would then ultimately be remitted to the car owner, X. Therefore, X would only pay $10 per day and no penalty or arbitrary charge. This would nullify the incentive to release quickly the car which is provided by the penalty portion of the demurrage charge.

To correct this situation, the proposed rule will be modified as follows: [20]

> (c) Excess demurrage shall not be remitted to a private car owner who for reasons attributable to the car owner causes the accrual of the excess charge. The excess amount, which would otherwise be remitted under the rule, shall in these situations be retained by the delivering carrier.

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20. Leases can provide for an adjustment if the demurrage is caused by reasons attributable to the lessor or lessee.

In determining if the excess demurrage is caused by reasons attributable to the car owner, this provision shall be interpreted and applied in accordance with demurrage rules and principles.

Earmarking.—Lastly, we conclude that no restrictions should be placed on the use of the funds to be remitted to car owners, either private or foreign roads. It would be difficult to force a car owner to purchase additional equipment, and to supervise and administer such a provision. The proposed remittance is a sufficient incentive to the purchase of additional cars without putting an absolute limit on the use of the remitted funds.

Upon consideration of the record, we conclude that adoption of the proposed rule, as amended, which is set forth below, would be in the public interest, is reasonable and otherwise lawful to "the maintenance of an adequate freight car supply" as required by section 1(6) of the act.

(a) Except as otherwise provided hereinafter, the nonowning railroad, on whose lines a car is being detained under demurrage, shall remit to the freight car owner, all demurrage charges collected in excess of $10 per car per day.

(b) That under this rule, for the purpose of determining the car owner in the lease of a freight car, the car owner will be the lessor, except that in cases where there is no notice of the identity of the lessor, the lessee shall be considered as the car owner.

(c) Excess demurrage shall not be remitted to a private car owner who for reasons attributable to the car owner causes the accrual of the excess charge. The excess amount, which would otherwise be remitted under the rule, shall in these situations, be retained by the delivering carrier.

FINDINGS.

We find:

(1) That the Commission has jurisdiction under section 1(6) of the act, as amended, and under its car service powers to consider the proposed demurrage remittance rule;

(2) That the proposed remittance to the freight car owner, except as restricted hereinafter, by a nonowning railroad, on whose lines a car is being detained under demurrage, of all demurrage charges collected in excess of $10 per car per day, is just, reasonable, and otherwise lawful;

(3) That under this rule, for the purpose of determining the car owner in the lease of a freight car, the car owner will be the lessor; except that in cases where there is no notice of the identity of the lessor, the lessee shall be considered as the car owner;

(4) That excess demurrage shall not be remitted to a private car owner who causes the accrual of that excess charge, but such amount shall be retained by the delivering carrier;

(5) That this decision is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

An appropriate order will be entered.

COMMISSIONER MURPHY, concurring in part, dissenting in part:

I am in agreement with the majority to the extent that it would promulgate regulations embodying the proposed remittance of demurrage charges as between regu-

lated common carriers by railroad. The implementation of that long-delayed program first conceived in 1972 should result in a marked improvement in freight car supply and utilization not only to the carriers but also to the shipping public. As such, it is another small step in this Commission's endeavors to improve the Nation's freight car supply. It is readily apparent that all problems relating to car supply cannot be resolved at one time or in one proceeding. See, in this connection, *Maintenance of Records Pertaining to Demurrage*, 352 I.C.C. 739, 793-794. Nevertheless, it is regrettable that this program was so unduly delayed. Undoubtedly, if the regulations were in effect, even on an interim basis, the several severe car shortages occurring subsequent to publication of the proposal would surely have been eliminated or ameliorated.

Turning next to the proposed extension of the remittance program to private car owners, the majority's decision aptly points to the many incipient problems awaiting that aspect of the proposal. A review of the record clearly shows that the private car owners actually contributed little to the resolution of this proceeding. And the majority tacitly acknowledges that deficiency by its recognition that the private car owners can only be included in the program by consideration of the evidence submitted by the railroads. In my separate expression, *Remittance of Demurrage Charges*, 349 I.C.C. 411, 444, I recognized such a distinct possibility and urged that the parties, including private car owners, be made aware of the need to furnish adequate data.

With respect to private cars, it is unclear as to who, the lessor or lessee, should or will receive the remittance. The extension of the program to private car owners will provide an opportunity for rebating or undue prejudice. Ideally, the private car owner, the lessor, should assume its recognized responsibilities by the proper placarding of

its car or by meeting the other requirements of the demurrage tariffs so that where the car is actually on the private tracks of the lessee the railroads will not be concerned with demurrage collection or other related problems.

Where the private car is held on railroad tracks at destination for lessee's purposes, then any resulting demurrage on the private car over $10 per day should be retained by the destination carrier. The railroads should not be required to act as a collection agency for the lessor of the private car without some form of compensation for those additional duties. Cf., the tariff provisions applying on c.o.d. services. As between railroads, the situation is different since they must settle among themselves the apportionment of revenues and payment of various costs or charges incurred in performing a transportation service.

The majority also implies that the railroad can offset erroneously remitted demurrage to private car owners by a deduction from future accounts. Whether that procedure is legally sound has not been adequately explained. Cf., the transit tariffs and procedures thereunder and 49 U.S.C. 66 applying on Government traffic.

To the extent that the majority's decision differs from the views expressed above, I respectfully dissent therefrom.

COMMISSIONER CHRISTIAN, whom COMMISSIONER MACFARLAND joins, dissenting:

I do not believe that the public benefits envisioned by the majority will materialize when the proposed rule is adopted.

The report foresees increased car utilization. However, with demurrage charges unchanged, I see no reason for a delinquent car user to change its habits. The proposed rule provides no incentive for a user to release cars held beyond free time.

The report foresees an improved car supply. It assumes that the demurrage charges remitted to the car owner will be used for car purchases. It also assumes that this minor increment in a car owner's return will influence future investment decisions. The report contains no economic analysis to support these assumptions, and in my opinion the available evidence appears to contradict these assumptions.

The cost of the program does not seem to justify the sole benefit of returning additional monies to the car owner. I do not think we should take an isolated action affecting freight car compensation when we know that the incentive per diem program, the mainstay of Commission efforts in this area, is currently being reevaluated. I believe that DOT is correct in suggesting a complete reassessment by the Commission of all rules governing freight car distribution and utilization rather than taking a narrow, disjointed action here.

COMMISSIONERS HARDIN and GRESHAM did not participate.

APPENDIX A

ASLRA study group data showing the relationship of demurrage to per diem

Railroad	Number of cars	Demurrage	Net per diem	Demurrage	
				After XP 289	Over/under net per diem[1]
		Class I S&T			
PBR[2]	151,563	$ 1.50	$ 0.35[3]	$ 0.99	$ 0.64
SB	91,709	2.89	0.73	1.94	1.21
PBNE	75,123	1.90	0.48	1.30	0.82
CBL	72,559	1.46	1.45	1.15	(0.30)
ALQS	70,024	11.38	2.11	6.26	4.15
LT	53,981	4.56	1.78	3.52	1.74
BS	50,712	0.89	3.03	0.55	(2.48)
MCRR	35,255	20.36	4.48	10.98	6.50
RT	30,351	2.42	3.86	1.96	(1.90)
CUVA	21,609	18.08	3.34	10.47	7.13
		Class II S&T			
MKC	20,446	11.66	5.02	6.20	1.18
DC	20,377	3.40	6.51	3.05	(3.46)
UMP	17,542	7.56	2.98	2.79	(0.19)
NSS	16,329	2.75	3.97	1.79	(2.18)
CTN	10,233	6.48	1.71	3.57	1.86
POV	7,512	1.66	(1.36)	1.40	2.76
WVT	5,316	17.82	5.41	6.63	1.22
MET	5,300	0.59	4.11	0.45	(3.66)
JSC	3,522	4.40	1.18	2.86	1.68
MJ	1,047	78.19	16.93	34.99	18.06
EEC	555	66.72	13.08	27.01	13.93
TN	28,925	8.83	4.48	4.67	0.19
CIC	7,424	19.61	12.91	13.18	0.27
GNWR	6,717	0.35	2.36	0.35	(2.01)
NLG	3,508	9.06	23.96	5.57	(18.39)
APA	3,390	2.46	11.73	1.19	(10.54)
SRN	3,089	6.25	9.13	4.33	(4.80)
EACH	2,193	0.15	4.08	0.14	(3.94)
LRS	2,045	2.98	5.93	1.37	(4.56)

1. Net per diem is gross per diem including mileage, less per diem reclaim where applicable.

2. For the alphabetical designations assigned by the Accounting Division of the Association of American Railroads and used in column A of pages 2 and 3 of this exhibit and elsewhere in ASLRA exhibits, the full railroad names are given in [ASLRA] appendix A. E.g., ALQS is the alphabetical designation of Aliquippa and Southern Railroad Company.

3. ASLRA in its reply statement, submits that nonincentive per diem has increased by 12 percent from the time this chart was compiled, and therefore, the per diem deficits are understated by 12 percent.

APPENDIX A–Continued

ASLRA study group data showing the relationship of demurrage to per diem–Continued

Railroad	Number of cars	Demurrage	Net per diem	Demurrage	
				After XP 289	Over/under net per diem [1]
		Class II S&T–Continued			
LEF	1,987	1.02	8.00	0.66	(7.34)
LNW	1,816	1.44	28.61	1.14	(27.47)
VSO	1,664	3.43	11.80	1.83	(9.97)
CHV	1,474	5.07	9.26	2.67	(6.59)
DR	1,143	5.26	18.67	3.43	(15.24)
ME	867	3.23	26.54	3.03	(23.51)
VCY	843	1.58	9.29	1.13	(8.16)
IAT	807	10.30	12.33	6.83	(5.50)
GRN	725	1.10	6.62	0.98	(5.64)
BML	668	4.97	26.88	2.92	(23.96)
MCSA	592	0.96	2.07	0.93	(1.14)
NB	533	.....	4.86	.....	(4.86)
CLCO	391	4.63	3.46	2.99	(0.47)
MB	310	0.06	5.73	0.03	(5.70)
FCIN	259	7.34	21.72	5.98	(15.74)
FJG	223	52.83	25.38	22.06	(3.32)
CLIF	139	10.43	7.50	6.47	(1.03)

APPENDIX B

Remittance of excess demurrage to foreign roads

Amount payable to foreign roads during test period of July 1, 1973 through December 31, 1973	ATSF	BN	CNW	CRIP	CO	D&RGW	FEC	ICG	MP	N&W	PC	SCL	SOU	SP	UP	Total amount payable to all foreign roads
Atchison T. & S.F.		$114,637	$30,650	$45,133	$24,270	$25,481	$10	$42,740	$88,385	$42,501	$98,680	$18,730	$45,400	$114,909	$113,340	$1,222,611
Burlington Northern	$58,080		96,980	37,380	33,250	20,960		49,650	57,360	61,100	47,750	25,240	37,230	43,930	102,230	1,058,210
Chicago North Western	63,381	275,560		40,974	84,410	7,080		75,320	58,610	59,910	219,980		68,240	34,189	85,479	1,601,792
Chicago Rock I. & Pacific							No information presented by CRIP									
Chessie System[1]	147,405	148,508	74,940	63,340	468,429	9,699	40	131,209	101,983	250,460	591,370	108,400	268,225	92,230	111,389	3,586,354
Denver & Rio Grande Western							No information presented by D&RGW									
Florida East Coast[2]	2,900	5,490	760	3,980	9,020	160		24,870	3,330	3,290	13,050	38,660	56,110	3,620	2,140	214,520
Illinois Central Gulf	137,022	92,133	190,150	49,180	23,410	3,090	40		121,945	77,410	85,051	42,060	100,400	40,760	49,560	1,622,377
Missouri Pacific[3]	246,354	17,660	53,470	88,730	55,425	12,070		63,340	142,485	55,800	90,930	33,170	84,365	66,975	91,490	1,953,404
Norfolk & Western	36,046	93,824	56,860		145,290	5,101		43,560	47,380		180,796	350	64,030	55,412	72,024	1,299,523
Penn Central*	225,570	376,360	254,770	136,340	576,410	37,070	80	242,100	265,020	629,280		275,870	601,650	226,160	262,480	7,879,450
Seaboard Coast Line	75,743	80,441	32,001	22,810	79,060	4,122	2,850	179,824	52,865	91,815	118,142		415,658	61,202	31,132	1,817,140
Southern Ry	50,694	87,490	35,860	35,525	179,515	3,260	370	141,215	114,041	93,205	174,255	217,243		62,920	40,382	1,235,975
Southern Pacific	276,900	136,450	24,180	25,650	26,740	37,390		82,550	77,120	35,060	72,270	17,290	38,370	295,830		1,505,385
Union Pacific	30	28,330	7,710	3,760	3,260	8,080		5,890	15,420	4,760	5,420	1,870	6,740	44,550		260,600
*If no service order had been in effect during the test period the amount to be remitted by PC would be as follows:	93,670	137,400	95,740	52,210	229,370	16,250	20	86,290	100,400	257,600		92,710	223,930	105,420	110,560	

[1]The Chessie System includes the Chesapeake & Ohio, the Baltimore and Ohio, Staten Island Corp. and Western Maryland Ry.
[2]The FEC figures above submitted individually differ somewhat from those submitted by Southeastern Demurrage and Storage Bureau.
[3]MP includes the Texas & Pacific, and the Chicago & Eastern Illinois.

APPENDIX C

Remittance of excess demurrage to private car owners

	General American Transport[1]	North American Car Corporation	Pullman Transportation Leasing Company	Shipper's Car Line	Trailer Train Co.	Union Tank Car	Total amount payable to all private car owners
ATSF	18,090	20,110	18,420	13,195	5,014	7,890	121,909
BN	29,730	22,130	5,440	14,550	7,100	11,300	123,570
CNW	24,580	25,610	12,110	17,870	16,830	3,820	129,640
ORIP							
Chessie	17,410	6,750	650	7,230	9,300	4,250	200,476
D&RGW							
FEC	810	60		20	850	140	3,410
ICG	6,410	40,745	6,500	20,260	2,870	11,780	147,864
MP	19,060	8,110		17,420	12,855	8,330	103,805
N&W	22,130	13,020	5,780		10,550	1,510	97,733
PC*	167,990	53,340	15,520		1,810	29,780	538,110
SCI	27,770	13,175	4,450	13,230	4,016	5,420	98,327
SOU	21,600	16,240	7,315	13,810	10,110	4,430	107,417
SP	21,640	22,505	28,690	27,890	16,500	28,966	204,685
UP	5,910	4,550	7,580	7,150	860	2,800	35,740
*If no service order had been in effect, PC would have remitted the following to private car owners.							
PC	167,990	37,900	68,500		1,810	2,930	

1. Where the participants used car reporting marks, we used *The Official Railway Equipment Register*, Vol. 92, No. 1 (1976) to determine the car owners.

APPENDIX D

The following is a list of the 42 roads used to estimate the cost of administering the rule. Only roads submitting complete data (number of excess days, amounts to be remitted, and administrative costs) for the study period July 1 through December 31, 1973, were used.

Burlington Northern Inc.
Penn Central Transp. Co. (ConRail)
Florida East Coast Ry. Co.
Union Pacific R.R. Co.
Chicago, Milwaukee, St. Paul-Pacific
Southern Railway System
Norfolk and Western Ry. Co.
Chicago and North Western Transp. Co.
Southern Pacific Transp. Co.
Western Pacific R.R. Co.
Oakland Terminal Ry. Co.
Central Calif. Traction Co.
Portland Traction Co.
San Manuel Arizona RR Co.
Holton Inter-Urban Ry. Co.
San Diego & Ariz. Eastern Ry.
Sacramento Northern Ry. Co.
Tidewater Southern Ry. Co.
Atchison Topeka & Santa Fe Rwy. Co.
Belt Railway Company of Chicago
Boston and Maine Corp.
Central Railroad Company of New Jersey
The Chessie System
C P Rail
Detroit, Toledo and Ironton RR Co.
Detroit & Toledo Shoreline RR
Duluth Missabe and Iron Range

Illinois Central Gulf RR
Illinois Terminal RR Co.
Kansas City Southern Lines
Lake Superior and Ishpeming R.R.
Los Angeles Junction Ry. Co.
Maine Central
Manufacturers Railway Co.
Missouri-Kansas-Texas Railroad
Missouri Pacific Railroad
The Monogehela Ry. Co.
Southern Pacific Transp. Co. (Texas & Louisiana Lines and St. Louis Southwestern Railway Company)
Louisville & Nashville R.R.
St. Louis-San Francisco Rwy. Co.
Terminal Railroad Ass'n.-St. Louis
The Texas Mexican Ry. Co.

ORDER

TITLE 49 - TRANSPORTATION
CHAPTER X - INTERSTATE COMMERCE COMMISSION
SUBCHAPTER C - ACCOUNTS, RECORDS, AND REPORTS
PART 1254 - MAINTENANCE OF RECORDS PERTAINING TO DEMURRAGE, DETENTION, AND OTHER RELATED ACCESSORIAL CHARGES BY RAIL COMMON CARRIERS OF PROPERTY

EX PARTE NO. 289
REMITTANCE OF DEMURRAGE CHARGES BY COMMON CARRIERS OF PROPERTY BY RAIL

It appearing, That pursuant to part 1 of the Interstate Commerce Act [sections 1(4), 1(5), 1(6), 1(10), 1(11), 1(13), 1(14), 1(15), 1(17), 1(21), 6(7), 13(4), and 15(1) thereof, the national transportation policy (49

U.S.C. preceding section 1)] and the Administrative Procedure Act (5 U.S.C. sections 553 and 559), a rulemaking proceeding was instituted by the Commission on October 12, 1972, for the purpose of considering whether the following rule should be adopted: "The nonowning railroad, on whose lines a car is being detained under demurrage, shall remit to the railroad car owner all demurrage charges collected in excess of $10 per day."

It further appearing, That investigation of the matters and things involved in this proceeding has been made and that the Commission has made and filed its report herein containing its findings of facts and conclusions thereon, which report is hereby referred to and made a part hereof, and which finds that adoption of the proposed rule, as amended therein, is warranted, wherefore,

It is ordered, That Part 1254 of Chapter X of Title 49 of the Code of Federal Regulations be, and it is hereby, amended as follows:

Sec. 1254.10.—Remittance of excess demurrage charges.

(a) Except as otherwise provided hereinafter, the nonowning railroad, on whose lines a car is being detained under demurrage, shall remit to the freight car owner, all demurrage charges collected in excess of $10 per car per day.

(b) That under this rule, for the purpose of determining the car owner in the lease of a freight car, the car owner will be the lessor; except that in cases where there is not notice of the identity of the lessor, the lessee shall be considered as the car owner.

(c) Excess demurrage shall not be remitted to a private car owner who for reasons attributable to the car owner causes the accrual of the excess charge. The excess

amount, which would otherwise be remitted under the rule, shall in these situations, be retained by the delivering carrier.

It is further ordered, That this order shall become effective 90 days after the date of service, and shall remain in effect until modified or revoked in whole or in part by further order of the Commission.

And it is further ordered, That notice of this order shall be given to the general public by depositing a copy thereof in the Office of the Secretary of the Commission at Washington, D.C., and by forwarding appropriate notice to the Director, Office of the Federal Register.

By the Commission.

ROBERT L. OSWALD,
Secretary.

(SEAL)

ORDER

INTERSTATE COMMERCE COMMISSION

EX PARTE NO. 289

REMITTANCE OF DEMURRAGE CHARGES BY COMMON CARRIERS OF PROPERTY BY RAILROAD

IN THE MATTER OF A STAY PENDING JUDICIAL REVIEW

PRESENT: Charles L. Clapp, *Vice Chairman,* to whom this matter has been assigned.

By petition filed August 11, 1977, the American Short Line Railroad Association (ALSRA) requested that the compliance date of the July 25, 1977, report and order of the Commission in this proceeding, as modified by the orders of June 22, 1977, and August 19, 1977, be stayed pending judicial review. A joint reply was filed on August 19, 1977, by the Burlington Northern, Inc., (BN) and the Union Pacific Railroad Company (UP).

In support of their request, petitioners refer to the significant startup and annual administrative costs that would have to be expended by both linehaul and short line railroads in order to comply with the Demurrage Remittance Rule. Moreover, petitioners emphasize that any further complication to the car hire deficits facing many short line railroads could force several lines operating at a profit into operating deficits. In contrast, petitioners contend that a substantial issue of first impression remains to be resolved with regard to the Commission's power to divide so purely local charge as demurrage. According to petitioners, a stay will not adversely affect the public interest since there is no earmarking requirement nor any indication that new equipment will be purchased while litigation is pending.

In their opposition to the stay BN and UP assert that irreparable injury will result to car owners for the monies

that would otherwise accrue to them by virtue of their investment. Accordingly, they argue that any monies collected after implementation would always be subject to refund if the rule were found to be unlawful. In the alternative, they argue that if a stay is ordered, the Commission should also order carriers to keep account of all monies, specifying in detail the railroads and private car owners in whose behalf such amounts were paid.

Petitioners present convincing argument to support a stay based upon the substantial startup costs necessary for compliance with the new rule. In comparison the BN and UP base their opposition on their preference for the new rule over the current system. They will not suffer irreparable injury from a delay in implementation. This reasoning, as a practical matter, compels a denial of replicants' keep account request since the cost of keeping account would be equivalent to startup and annual administrative costs for the new rule.

IT IS ORDERED:

1. That the petition of ALSRA for a stay in the compliance date pending judicial review be, and it is hereby, granted; and

2. That this stay will remain in effect until further order of the Commission.

Dated at Washington, D.C., this 23rd day of August, 1977.

By the Commission, Vice Chairman Clapp.

H. G. HOMME, JR.

(SEAL) Acting Secretary

APPENDIX C.

Statutes Involved.

§ 10705. Authority: Through Routes, Joint Classifications, Rates, and Divisions Prescribed by Interstate Commerce Commission.

(a)(1) The Interstate Commerce Commission may, and shall when it considers it desirable in the public interest, prescribe through routes, joint classifications, joint rates (including maximum or minimum rates or both), the division of joint rates, and the conditions under which those routes must be operated, for a common carrier providing transportation subject to the jurisdiction of the Commission under subchapter I, II (except a motor common carrier of property), or III of chapter 105 of this title. When one of the carriers on a through route is a water carrier, the Commission shall prescribe a differential between an all-rail rate and a joint rate related to the water carrier if the differential is justified.

(b) The Commission shall prescribe the division of joint rates to be received by a carrier providing transportation subject to its jurisdiction under chapter 105 of this subtitle when it decides that a division of joint rates established by the participating carriers under section 10703 of this title, or under a decision of the Commission under subsection (a) of this section, does or will violate section 10701 of this title. When prescribing the division of joint rates of a rail or water carrier under this subsection, the Commission shall consider—

(1) the efficiency with which the carriers concerned are operated;

(2) the amount of revenue required by the carriers to pay their operating expenses and taxes and re-

ceive a fair return on the property held and used for transportation;

(3) the importance of the transportation to the public;

(4) whether a particular participating carrier is an originating, intermediate, or delivering line; and

(5) other circumstances that ordinarily, without regard to the mileage traveled, entitle one carrier to a different proportion of a rate than another carrier.

(c) If a division of a joint rate prescribed under a decision of the Commission is later found to violate section 10701 of this title, the Commission may decide what division would have been reasonable and order adjustment to be made retroactive to the date the complaint was filed, the date the order for an investigation was made, or a later date that the Commission decides is justified. The Commission may make a decision under this paragraph effective as part of its original decision.

(e) (1) The Commission may begin a proceeding under subsection (a) or (b) of this section on its own initiative or on complaint and may take action only after a full hearing. The Commission must complete all evidentiary proceedings to adjust the division of joint rates for transportation by rail carrier within one year after the complaint is filed if the proceeding is brought on complaint or within 2 years after the commencement of a proceeding on the initiative of the Commission and must take final action by the 270th day after completion of the evidentiary proceedings. The Commission may decide to extend such a proceeding to permit its fair and expeditious completion, but when the Commission cannot meet those time limits, it must report its reasons to Congress.

(2) When a carrier begins a proceeding to adjust the division of joint rates for transportation by a rail carrier under this section by filing a complaint with the Commission, the carrier must also file all of the evidence in support of its position with the complaint and, during the course of the proceeding may only file rebuttal or reply evidence unless otherwise ordered by the Commission.

(3) When the Commission receives a notice of intent to begin a proceeding to adjust the division of joint rates for transportation by a rail carrier under this section, the Commission shall allow the party filing the notice the same right to discovery that a party would have on filing a complaint under this section.

(f) When there is a shortage of equipment, congestion of traffic, or other emergency declared by the Commission, it may prescribe temporary through routes that are desirable in the public interest on its own initiative or on application without regard to subsection (c) of this section, subchapter II of chapter 103 of this title, and subchapter II of chapter 5 of title 5.

§ 10747. Transportation services or facilities furnished by shipper

A carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title may publish in a tariff filed with the Commission under subchapter IV of this chapter a charge or allowance for transportation or service for property when the owner of the property, directly or indirectly, furnishes a service related to or an instrumentality used in the transportation or service. The Commission may prescribe the maximum reasonable charge or allowance a carrier subject to its jurisdiction may pay for a service or

instrumentality furnished under this section. The Commission may begin a proceeding under this section on its own initiative or on application.

§ 10750. Demurrage charges

A rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter I of chapter 105 of this title shall compute demurrage charges, and establish rules related to those charges, in a way that fulfills the national needs related to—

(1) freight car use and distribution; and

(2) maintenance of an adequate supply of freight cars to be available for transportation of property.

§ 10761. Transportation prohibited without tariff

(a) Except as provided in this subtitle, a carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title shall provide that transportation or service only if the rate for the transportation or service is contained in a tariff that is in effect under this subchapter. That carrier may not charge or receive a different compensation for that transportation or service than the rate specified in the tariff whether by returning a part of that rate to a person, giving a person a privilege, allowing the use of a facility that affects the value of that transportation or service, or another device.

(b) The Commission may grant relief from subsection (a) of this section to contract carriers when relief is consistent with the public interest and the transportation policy of section 10101 of this title. The Commission may begin a proceeding under this subsection on application of

a contract carrier or group of contract carriers and on its own initiative for a water contract carrier or group of water contract carriers.

§ 11903. Rate, discrimination, and tariff violations

(a) A person that knowingly offers, grants, gives, solicits, accepts, or receives by any means transportation or service provided for property by a common carrier subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title (1) at less than the rate in effect under chapter 107 of this title, or (2) by practicing discrimination, shall be fined at least $1,000 but not more than $20,000, imprisoned for not more than 2 years, or both.

(b) A carrier providing transportation or service subject to the jurisdiction of the Commission under chapter 105 of this title or an officer, director, receiver, trustee, lessee, agent, or employee of a corporation that is subject to the jurisdiction of the Commission under that chapter, that willfully does not file and publish its rates or tariffs as required under chapter 107 of this title or observe those tariffs until changed under law, shall be fined at least $1,000 but not more than $20,000, imprisoned for not more than 2 years, or both.

(c) When acting in the scope of their employment, the actions and omissions of persons acting for or employed by a carrier or shipper that is subject to subsection (a) or (b) of this section are considered to be the actions and omissions of that carrier or shipper as well as that person.

(d) Trial in a criminal action under this section is in the judicial district in which any part of the violation is committed or through which the transportation is conducted.

Administrative Procedure Act

Section 10(e) [5 U.S.C. 706]

"To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party and due account shall be taken of the rule of prejudial error."

IN THE

Supreme Court of the United States

October Term, 1978.

No. 78-1069

BALTIMORE AND OHIO CHICAGO TERMINAL RAILROAD COMPANY, et al.,

Petitioners,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Respondents.

On Petition for Certiorari to the United States Court of Appeals for the Third Circuit.

PETITIONERS' REPLY.

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STATEMENT.

In this instance, the Interstate Commerce Commission directed the railroads collecting demurrage to divide demurrage revenues with the car owner, railroad or private. Both the federal respondents and the intervening railroads in opposition seek to defend the agency's action with the suggestion that freight car ownership and utilization will improve.

It is beyond cavil that a consignee may hold a freight car on demurrage so long as he is willing to pay the published charges. The proposed remittitur, however, makes no change in the published charges, and it is obviously a

matter of supreme indifference to the consignee as to whom he will pay the same money.

Similarly, while two railroads support the Commission's proposal, 37 Class I railroads and the American Short Line Association (No. 78-1049) oppose it. Included in the list of petitioners, moreover, are large railroads which would reap a significant financial benefit if the Commission's proposal were to take effect. This fact alone should give the Court pause for thought.

On three well-defined issues of law, moreover, the Commission has misinterpreted and/or exceeded its authority, and the lower Court erred in sustaining the agency's proposal. The briefs of the federal respondents and the two railroads intervening in opposition to the petition only confirm the necessity for careful scrutiny of the subject by this Court.

THE ISSUES.

1. Whether Authority to "Compute" Demurrage Charges Includes Authority to "Divide" Those Revenues Between Railroads and/or Shipper Car Owners.

To "compute," as defined in Webster's New Twentieth Century Dictionary" (1964), means to "calculate, appraise, estimate, reckon, count, value or rate." The same source defines "divide" as to "part, sever, distribute, share or partition."

Obviously, the Commission "divided," rather than "computed." But the federal respondents here—and the lower Court—evade this question with the suggestion that Section 1(6) also authorizes the agency to establish "rules and regulations relating to such charges." Such rules and regulations, however, are plainly limited to *computations*, not *divisions*.

The federal respondents do not address the problem of divisions. Ir. contrast, the intervening railroads contend that Section 15(6)(a) applies only to joint rates reached by agreement (p. 8). But the only authority granted the agency to "divide" revenues lies under former Section 15(6)(a). The opposition cannot have it both ways. If the Commission simply "computes," it may do so without reference to 15(6). When it "divides" revenues, as it indisputably proposes here, demurrage revenues must necessarily be accepted as *joint* rates or charges of one kind or another, and the Commission is thereby bound to decide the appropriate division under the principles set forth in 15(6)(a). Other agency devices of the same nature designed to re-align revenue divisions between carriers without reference to 15(6)(a) have been uniformly set aside. See, for example, *Aberdeen & Rockfish R. Co. v. United States*, 565 F.2d 327, 335 (C.A. 5, 1977).

2. Whether the Commission's Proposal Authorizes Rebates Prohibited by Sections 15(15) of the Interstate Commerce Act and 41(1) of the Elkins Act.

The opposition alleges that the collecting carrier may remit to private shippers all or any part of the demurrage revenues accrued without violating the Act because demurrage is neither a "rate" nor a "charge" (Fed,, p. 8).* If demurrage is actually neither, there should be no obligation upon the carrier to collect it in the first place. But the Commission's Tariff Circular 20 provides that:

> "Each carrier or its agent shall publish, post, and file tariffs which shall contain in clear, plain, and specific form and terms all the rules governing *rates and charges* for *demurrage,* switching and floating . . . which *in any way* increase or decrease the value of service to the shipper."

* Brief of Federal respondents.

The reference to an "increase or decrease in value" is clearly patterned on the Elkins Act, which forbids any departure from published tariff rates "by any device *whatsoever.*"

Demurrage charges, accordingly, are published in the same manner as any other railroad rate or charge. And, contrary to the statement of the federal respondents (p. 8), the Commission does not "establish" demurrage charges. Rather, they accept—and either approve or disapprove—of railroad proposals to "re-compute" demurrage charges. Such "re-computation" by the railroads—through published tariffs—was suspended and thereafter approved by the Commission in *Demurrage Rules And Charges, Nationwide*, 340 I.C.C. 83 (1971). Another such re-computation of demurrage charges by the railroads was only recently approved by the Commission in Suspension Board No. 68867) (Fed., p. 3).

Summarizing, the petitioners, by the Act and by Commission edict, are required to publish demurrage charges in the same tariffs which contain their other rates and charges. They are expressly forbidden to accomplish rebates (collection of anything less than the published rate) by "any device whatsoever."

The federal respondents (pp. 7-9) then suggest that since demurrage charges are neither "rates" nor "charges" as those terms are referred to in the Act, there could be no forbidden discrimination if any portion of such charges were returned to the private shipper owner.* However, if Shipper A pays the published rate from X to Z, using railroad cars, and Shipper B pays the same rate using B's own cars, B will receive not only the tariff benefits of its own cars (via a lower published rate or a published allowance), B will receive, in addition, a remittitur of demurrage charges over and above any published tariff

* Duval, p. 3, admits that the collecting railroad must *retain* such charges.

allowance. To that extent, B is preferred over A in clear violation of 49(15)(15)(a) and (41)(1).

Accordingly, if the railroads, pursuant to (15)(15)(a) and (41)(1) are required to assess and collect their published demurrage charges, any remittitur becomes a prohibited "device" resulting in rebate to the favored shipper.

3. Whether the Lower Court Erred in Refusing to Enforce the Time Limitation Enacted by the Congress.

There is no question but that the agency proceeding was a "formal investigation" and that the Commission did not conclude the matter until more than one year after the April 1, 1976 enactment date of the 4R Act. The Commission's action thereby clearly violated the time limits set forth in former Section 17(14)(b), but the Court declined to enforce the will of the Congress because of the "vast resources" expended during the proceeding.

The Congress, of course, had every reason to expect that the Commission would observe the statutory time limits and that the courts would enforce them. The Congress, moreover, would surely be aware that substantial "resources" would be expended in any investigation which was already three years old at the enactment of 4R. Finally, the Congress subsequently eliminated 17(14)(b) in the belief that it had been "executed." Obviously, it had not. The lower Court's action has clearly thwarted the clear intent of the Congress, and this Court should rectify that error.

Respectfully submitted,

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